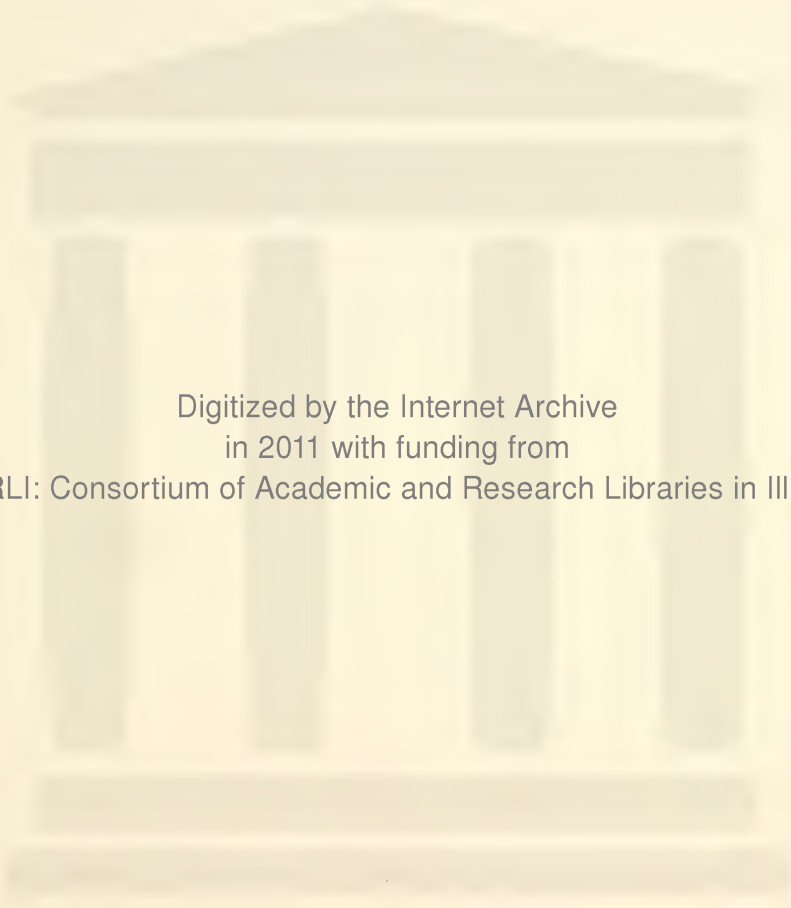

221A

46537

71 I.A. 2d 15

DEWEY HYMAN, REUBEN HYMAN, BERNARD HYMAN and SAUL HYMAN, co-partners, doing business as H. HYMAN AND CO.,

Plaintiffs-Appellants,

v.

230 SO. FRANKLIN CORPORATION, a corporation, ARTHUR RUBLOFF & CO., a corporation; AMERICAN NATIONAL BANK AND TRUST COMPANY, a corporation, individually and as Trustee under Trust No. 7515; SAMUEL R. BALLIS, MAX LANDESMAN, HARRY BALLIS, HERMAN BALLIS, ALBERT BALLIS, FRIEDA BALLIS, SAMUEL GLICKMAN, SAMUEL W. BANOVITZ, JOSEPH BEST, CARL MADDA, GRACE MADDA and LEON BIALOSTOZKY, individually and as co-partners, doing business as JACKSON-FRANKLIN BUILDING,

Defendants-Appellees.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY

3/47 70

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

The plaintiffs' second amended complaint alleges that the defendants owned and operated a building at 224-230 South Franklin Street, Chicago; that they rented the fifth and sixth floors thereof to plaintiffs in consideration of certain rentals to be paid; that in the premises occupied by them plaintiffs were engaged in the business of manufacturing wearing apparel; that at all pertinent times they were in the exercise of due care and caution for the safety of the premises and their personal property therein; that on March 30 and 31, 1949 defendants had control of the roof, gutters, parapets and other appurtenances of the roof; and that a large amount of water was caused to collect upon the roof and came through the roof down

to the premises occupied by plaintiffs, thereby causing damage to them.

Plaintiffs further allege that the defendants disregarded their duty in one or more of the following particulars: (a) negligently and carelessly operated, managed and controlled the roof, gutters, parapets and appurtenances to the roof; (b) negligently and carelessly failed to keep the roof, gutters, parapets and appurtenances to the roof in proper repair, although the defendants knew, or in the exercise of ordinary care, should have known that the roof, gutters, parapets and appurtenances to the roof were not in good and proper repair on the dates aforesaid; (c) negligently and carelessly attempted to repair the roof, gutters, parapets and appurtenances to the roof; and (d) wilfully and wantonly operated, managed and controlled the roof, gutters, parapets and appurtenances to the roof by failing to keep the aforesaid in proper repair when the defendants knew, or in the exercise of ordinary care, should have known that the aforesaid were not in good and proper repair and would likely result in damage to the property of the plaintiffs and others. An additional count did not charge the defendants with any specific acts of negligence, but did charge: that at all times mentioned defendants had sole and exclusive possession of the roof, gutters, parapets and appurtenances to the roof; that they failed to exercise ordinary care in the operation, management and control of the roof, gutters, parapets and appurtenances to the roof over which the defendants had sole and exclusive

control; and that by reason of the sole and exclusive control of the defendants the facts pertaining to the disregard of duty are within the sole and exclusive knowledge of the defendants. Damages of $19,122.32 were claimed for the copartners and $2,211.74 for the corporation.

The defendants, (except Arthur Rubloff & Co., hereinafter called the agent, and 230 So. Franklin Corporation), denied that they operated, managed and controlled the premises, denied that plaintiffs were in the exercise of due care and caution and denied that they were guilty of any of the charges. They also pleaded as an affirmative defense a lease dated October 13, 1944, which contained the following language:

"5. Lessee covenants and agrees that he will protect and save and keep the lessor forever harmless and indemnified against and from any penalty or damage or charges imposed for any violation of any laws or ordinances, whether occasioned by the neglect of lessee or those holding under lessee; and that lessee will at all times protect, indemnify and save and keep harmless the Lessor against and from any and all loss, cost, damage, or expense, arising out of or from any accident or other occurrence on or about said premises, causing injury to any person or property whomsoever or whatsoever and will protect, indemnify and save and keep harmless the lessor against and from any and all claims and against and from any and all loss, cost, damage or expense arising out of any failure of lessee in any respect to comply with and perform all the requirements and provisions hereof.

"6. Lessor shall not be liable for any damage occasioned by failure to keep said premises in repair, nor for any damage done or occasioned by or from plumbing, gas, water, sprinkler, steam or other pipes or sewerage or the bursting, leaking or running of any pipes, tank or plumbing fixtures, in, above, upon or about said building or premises, nor for any damage occasioned by water, snow or ice being upon or coming through the roof, skylights, trap door or otherwise, nor for any damage arising from acts, or neglect of co-tenants, or other occupants of the same building, or of any owners, or occupants, of adjacent or contiguous property."

Paragraph 19 of the lease states that "this lease and all covenants and agreements herein contained shall be binding

upon, apply, and inure to their respective heirs, executors, administrators, and assigns of all parties", and that "where in this instrument rights are given to either lessor or lessee, such rights shall extend to the agents, employees, or representatives of such persons." Defendants allege as one of their defenses that the lease sets forth an indemnification and waiver by plaintiffs of the acts and damages claimed. These defendants also filed a counterclaim against the agent based upon a management agreement between Jackson-Franklin Building, a copartnership, and the agent providing that the agent would perform certain duties from August 17, 1948 to July 19, 1951 concerning the premises. An answer by another defendant, 230 So. Franklin Corporation, made substantially the same denials as the other defendants and asserted the same affirmative defense. The agent filed a similar answer and affirmative defense and also filed an answer to the counterclaim in which it admitted the existence of the management agreement but denied the other allegations.

Plaintiffs filed motions to strike the answers of all defendants except the 230 So. Franklin Corporation. All the parties stipulated that the following facts were to be considered as true only in the matter of the motions of plaintiffs to strike the answers: that plaintiffs occupied a certain part of the premises on the dates set forth in accordance with a lease between plaintiffs and the 230 So. Franklin Corporation dated October 13, 1944; that at the time of the occurrence complained of the American National Bank and Trust Company held title to the premises under a

trust agreement and the named copartners were doing business as Jackson-Franklin Building and were beneficiaries under the trust and as such, operated, managed and controlled the premises; that the lease was assigned by the 230 So. Franklin Corporation on September 8, 1948 to American National Bank and Trust Company, as Trustee, and Jackson-Franklin Building, a copartnership, without notice to plaintiffs; that a management agreement had been entered into between the agent and Jackson-Franklin Building, a copartnership, concerning the premises; and the property was managed by the agent on the dates alleged in the complaint.

The court found that the exoneration clause of the lease inured to the benefit of all the defendants and that therefore the plaintiffs cannot recover against any of the defendants and overruled the motions to strike the answers. Plaintiffs elected to stand on their motions and the court entered judgment in favor of the defendants. Plaintiffs, appealing, ask that the judgment be reversed and that the cause be remanded with directions to sustain plaintiffs' motions to strike and to proceed with the trial of the case on its merits.

Plaintiffs assert that the exculpatory provisions in the lease do not protect the landlord from active or affirmative negligence. The defendants argue that these provisions protect the landlord not only from so-called affirmative negligence but from wilful and wanton misconduct as well. They insist, however, that there are no charges of wilful and wanton misconduct in the second amended complaint.

The allegation in this respect is that the defendants wilfully and wantonly operated, manged and controlled the roof, gutters, parapets and appurtenances to the roof by failing to keep the aforesaid in proper repair when the defendants knew, or in the exercise of ordinary care, should have known that the aforesaid were not in good and proper repair and likely to result in damage to the property of plaintiffs and others. This allegation amounts to no more than a charge of lack of knowledge of the condition of the roof and appurtenances because of the failure of defendants to exercise ordinary care, Hence we do not have before us for decision whether the exculpatory provisions protect the landlord from wilful and wanton misconduct. The cases of Arling v. Zeitz, 269 Ill. App. 562, and Cerny Pickas & Co. v. C. R. Jahn Co., 347 Ill. App. 379, support plaintiffs' position that the exculpatory provisions in the lease do not protect the landlord from active or affirmative negligence.

The latest expression of our Supreme Court with respect to the efficacy of exculpatory provisions of a lease are found in Jackson v. First National Bank of Lake Forest, 415 Ill. 453. The court said (461):

"Though there have been ~~xx~~ pronouncements that one may never, by contract, avoid liability for his negligence, that has not been the law of this State, and this court has, under proper circumstances, recognized the validity of such agreements. * * * This court has, therefore, gone upon record as approving exculpatory agreements in business leases relieving the landlord from liability for injuries to the tenant's property due to the negligence of the landlord or his servants."

After a careful reading of the Jackson case we are of the opinion that the principle announced is applicable to active as well as passive negligence. To hold otherwise would invite confusion. In that case the Supreme Court recognized the efficacy of the exculpatory clause in active as well as passive cases. We are satisfied that the exculpatory clause bars a recovery by plaintiffs.

Plaintiffs maintain that the defendants, with the exception of the 230 So. Franklin Corporation, are not entitled to assert the exculpatory provision of the lease as a defense as they are not parties to the lease. The only party with whom the plaintiffs entered into a lease is the 230 So. Franklin Corporation. The lease was assigned by that corporation prior to the occurrence and without notice to the plaintiffs. All leases, except leases at will, may be assigned if there is no restriction in the leases.

Defendants were the assignees of the lease and are entitled to all the benefits and obligations of the terms of the lease. Section 14 of the Landlord and Tenant act (Par. 14, Ch. 80, Ill. Rev. Stat. 1953) gives to lessor's assignee or grantee of the demised premises the same rights that the lessor has. Section 15 of that act gives to lessee's assignee or personal representatives the same rights that the lessee has. The lease in the instant case provides that the covenants and agreements therein shall be binding upon, apply and inure to the respective heirs, executors, successors, administrators and assignees of all the parties to the lease.

Plaintiffs urge that the agent is not in a position to plead any condition of the lease as an affirmative defense, pointing out that the premises were being managed by it under the terms of a management agreement between it and the Jackson-Franklin Building, a copartnership, and that the agent is not a party to the lease and should not be entitled to take advantage of any of its provisions. The agent is in the same position, so far as the exculpatory provisions of the lease are concerned, as the lessor. In Section b of the Comment under the footnote of Section 343, Restatement of the Law of Agency, the author says: "An agent may be privileged to do an otherwise tortious act because of a privilege held by his principal under which he acts." Section 347, Comment, states:

"a. * * * On the other hand, when an immunity exists in order more adequately to protect the interests of a person in relation to his property, the agent may have the principal's immunities. Thus, the servant of a landowner while acting in the scope of his employment is under no greater duties to unseen trespassers than is the landowner; * * *."

It is our view that the trial judge was right in his ruling and the judgment of the Superior Court of Cook County is affirmed.

JUDGMENT AFFIRMED.

FRIEND, J., AND NIEMEYER, J., CONCUR.

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7 I.A. 2d 16

46565

CHRISTINE DE SALVO, Appellee, v. THOMAS DE SALVO, Appellant.	)	APPEAL FROM SUPERIOR COURT COOK COUNTY.

46601

CHRISTINE DE SALVO, Defendant in Error, v. THOMAS DE SALVO, Plaintiff in Error.	)	ERROR TO SUPERIOR COURT COOK COUNTY.

MR. PRESIDING JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

On February 24, 1948 Christine De Salvo and Thomas De Salvo were married at Chicago. No children were born of the marriage. On October 19, 1953 she filed a complaint for separate maintenance in the Superior Court of Cook County. An appearance was filed for him by an attorney. He did not file an answer. On December 8, 1953 the court entered an order that defendant pay to plaintiff $30 a week as temporary alimony, retroactive to November 10, 1953, and temporary solicitor's fees of $75. By leave of court and on due notice his attorney withdrew on March 1, 1954. On May 19, 1954 the case came on for trial. The defendant did not appear in person or by attorney. On that day the court entered a decree sustaining the allegations of the complaint. The

chancellor found that as of May 11, 1954 the defendant was in arrears in payment of temporary alimony in the sum of $350, decreed that he pay plaintiff for support and alimony $30 per week commencing May 18, 1954, that he forthwith pay the $350 arrears in temporary support under the order of December 8, 1953, that he forthwith pay to the attorney for plaintiff $350 for attorney's fees and reserved jurisdiction to enforce the decree.

On June 25, 1954 plaintiff filed a petition stating that defendant was in arrears as of June 22, 1954 in the amount of $55 in the payment of permanent alimony and $350 in temporary alimony under the order of December 8, 1953, and $350 for attorney's fees, and that his refusal to pay these amounts was contumacious. On July 9, 1954 defendant appeared in person and by attorney and filed an answer to plaintiff's petition in which he said that the decree for separate maintenance entered on May 19, 1954 was "null and void and contrary to the statute in such cases made and provided" and that as to plaintiff's statement of arrearages of alimony of $55 and $350 he "denies that he has knowledge or information of any monies due and owing" to her. He denied that any sum was due to plaintiff's attorney for attorney's fees. He said that he did not comply with the decree because he was denied "due process of law" and concluded by denying "knowledge or information of any arrearage as alleged to be due and owing." On the same day, July 9, 1954, he filed a motion to vacate or modify the decree on the ground that his

former attorney "failed or neglected to file an answer to the complaint for separate maintenance" and that "hence, no issues were framed upon the allegations as charged." He said that from March 1, 1954 "and thence forward" he was without counsel and "therefor denied and deprived of his day in court by due process" and that to and including May 19, 1954 he "was never apprised by notice and process of law" that the cause was set for trial. He asked that the decree for separate maintenance and the provisions for support and attorney's fees be held for naught and that he be given his day in court.

An affidavit by the defendant, attached to the motion to vacate the decree, states that "he is a citizen of Italian extraction and that his education and schooling are limited to the Italian language"; that from the time of the filing of the complaint he has been continuously in contact and "collaborated" with plaintiff; that the attorneys for the parties sought a reconciliation and that the reconciliation "was more or less in effect" on March 1, 1954, at which time defendant's attorney withdrew; that he "never" wilfully or wantonly abandoned plaintiff without just cause; that he did not at any time refuse to support his wife; that since the entry of the decree he "has been in constant and continuous communication with his wife" and "more of recent date has he daily attended to her devotions as provided for under his marital vows and has been at all times dutiful to his obligations for the support and maintenance" of plaintiff prior to and subsequent to the entry of the decree.

On July 23, 1954 the court denied the motion to vacate or modify the decree and "set the bond for appeal" in the amount of $1,000. On the same day the chancellor entered an order reciting that on a rule to show cause theretofore entered and the defendant being present in open court in person and represented by counsel and the court "hearing all of the testimony of the parties" and being fully advised in the premises, found that there was due and unpaid under the decree of May 19, 1954 the sum of $755.00; that no sufficient cause was shown by defendant why that amount should not have been paid or that he has been or is unable to pay it; and that defendant, although well able so to do, "has wilfully and in contempt of court failed and refused and still refused to pay plaintiff the sum of $755." The court decreed that the defendant is guilty of wilful contempt for his wilful failure to pay plaintiff $755, ordered the clerk to issue a mittimus directing that defendant be taken into custody by the sheriff, that he be committed to the County Jail for a period not to exceed six months unless he shall sooner purge himself of the contempt by paying plaintiff or the sheriff for her use $755.00, or unless he shall sooner be discharged by due process of law. On July 27, 1954 an "indemnifying bond" in the penal sum of $1,000 was approved and the defendant released from custody until the further order of the court.

On August 10, 1954 plaintiff filed a petition stating that the defendant "is and will become in arrears" under the decree from June 29, 1954 to August 10, 1954 in the

sum of $90; that he informed her he does not intend to contribute "one penny" towards the support order in the future; and that it became necessary for her to employ counsel to enforce the decree. She asked that he be held in contempt of court and that he be ordered to pay a reasonable sum for her attorney's fees. In an answer to the petition defendant stated that the averments in plaintiff's petition are res-judicata and "tolled by the approval and posting of the surety and appeal bond on July 27, 1954"; that from July 27, 1954, when he was released from imprisonment, he "has suffered unemployment due to illness and lack of work due to weather conditions and want of materials"; that since his release he has been burdened with expenses such as payment of bondsmen and attorney's fees; that he is an indigent person, not steadily employed; that he has directed his attorney to proceed with the appeal; and that he stands ready and willing to provide for his wife according to his salary. He concluded by moving to strike the petition "for want of jurisdiction of the subject matter" as being "matters res judicata, and formerly secured by surety bond in the amount of $1,000." The court entered a rule on the defendant to show cause why he should not be committed for contempt of court.

On September 7, 1954 defendant filed a motion to vacate the order of July 23, 1954 "overruling the motion to vacate or modify the decree for separate maintenance." On that day the chancellor denied defendant's motion, discharged the rule to show cause and ordered that the motion for attorney's fees be continued until the further order of the court.

On September 17, 1954 defendant filed notice of appeal from the order of September 7, 1954, the order of committment of July 23, 1954 and from the order which overruled defendant's motions to vacate the decree and prays that "the entire proceeding of the plaintiff filed in vacation term of the Superior Court, beginning on June 25, 1954 to and including September 7, 1954, be reversed" and that all orders denying motions and petitions offered by the defendant in vacation term be reversed. Defendant also sued out a writ of error and the cases have been consolidated for hearing.

Defendant states that he is appealing from the decree for separate maintenance and the "judgment orders." The notice of appeal, however, purports to be an appeal from an order of September 7, 1954, an order denying defendant's motion to vacate the decree, an order committing defendant for contempt, an order of August 31, 1954, and the entire proceedings from June 25, 1954 to September 7, 1954. The decree was entered on May 19, 1954. The notice of appeal was filed September 17, 1954. Defendant did not invoke the provision of paragraph 7 of Section 50 of the Civil Practice Act (Par. 174, Chap. 110, Ill. Rev. Stat. 1953) that the court may within 30 days after entry set aside a final decree upon good cause shown by affidavit and upon such terms and conditions as shall be reasonable. After thirty days from the entry of the decree he filed a motion but did not make any showing which would bring him within the provisions of Section 72 of the Practice Act (Par. 196, Chap. 110, Ill. Rev. Stat. 1953). There could be no appeal from the decree

as a matter of right on September 17, 1954, the day the notice of appeal was filed, as Section 76 of the Practice Act (Par. 200, Chap. 110, Ill. Rev. Stat. 1953) states that no appeal shall be taken after the expiration of ninety days from the entry of the order, decree or judgment complained of. The complaint for separate maintenance came on to be heard on the regular call. Although there was no duty on the plaintiff to notify the defendant that the cause had been set for trial, the attorney for plaintiff did so.

The first point urged by defendant is that the uncontroverted facts oppose the decree and orders. He did not appeal from the decree and did not make any showing which would entitle him to relief under a petition filed pursuant to Section 72 of the Practice Act or under a petition in the nature of a bill of review. The orders entered subsequent to the decree were based on the record, verified petitions, affidavits and testimony heard in open court. As no report of proceedings has been certified to us, we assume that the testimony supports the orders. The arrearages found by the court are supported by the record, which also supports the finding that his failure to comply with the decree was wilful and contumacious.

The second point argued by defendant is that in a suit for separate maintenance plaintiff has the burden of showing that she is living separate and apart from her husband without her fault. Our statement that he did not appeal from the decree and that he did not make adequate showing for relief in motions and petitions filed more than thirty days

after the entry of the decree, is applicable to this point. Plaintiff concedes the general rule that in a separate maintenance complaint the burden is on the plaintiff to show that she was living separate and apart from the defendant without fault on her part. A perusal of the transcript of testimony in the ex parte hearing of the separate maintenance case satisfies us that plaintiff established all the jurisdictional requisites.

As the third point defendant asserts that the decree for separate maintenance may at any time upon due notice be amended or modified as justice and equity may require. A decree for separate maintenance may be modified when there is a change of circumstances. In the instant case the petitions and motions of the defendant to modify the decree do not show any change in circumstances. The reason given for changing the decree is that defendant's attorney failed or neglected to file an answer and that he was without counsel and therefore deprived of his day in court. The court, on notice to defendant, consented to the withdrawal of defendant's attorney. Defendant knew that the attorney had withdrawn and that he had a right to retain another attorney. He did not do so until he hired his present attorney. He had a right to his day in court but failed to appear. The fact that he did not appear or retain another attorney should not be charged to plaintiff. In his fourth point defendant maintains that the chancellor did not have jurisdiction to enter the decree. Defendant was served with summons and filed his appearance. He was in open court when the order for temporary alimony was entered. The court had jurisdiction of the subject matter and the parties.

In his fifth point defendant states that attorney's fees in a separate maintenance action, after the decree became final, cannot be employed for reprisal, contempt and imprisonment. Plaintiff answers that she is not attempting to imprison the defendant for failure to pay attorney's fees. The court ordered defendant to pay alimony and attorney's fees. He is in default in both. The court has power to commit for failure to comply with orders and decrees awarding alimony and support money. Sec. 42, Ch. 22, Ill. Rev. Stat. 1953. The defendant argues that the provision of Section 22 of Chapter 68 that the court at any time after service of summons and proper notice to the wife or husband, may make such allowance for temporary alimony, attorney's fees and suit money as may appear just and equitable as in cases of divorce, cannot be invoked for the wilful refusal to obey orders after the decree becomes final. The defendant fails to distinguish between an application for temporary alimony and attorney's fees and the provision in a final decree for the payment of alimony and attorney's fees. Section 22 does not limit the power of the court to enter a final decree providing for alimony and attorney's fees in separate maintenance cases. In fact, the chief purpose in that type of case is to secure support money for the wife or husband.

In support of his position defendant cites Pressney v. Pressney, 339 Ill. App. 371. There the plaintiff discharged her attorney. We held that the trial court could not enter an order allowing the discharged attorney a fee to be paid out of the wife's money, holding that his

remedy was to sue his own client at common law. The case is not applicable. In Hoffman v. Hoffman, 316 Ill. 204, a separate maintenance case, the court said (214):

"Under section 15 of the Divorce act (Smith's Stat. p. 747,) the court was empowered to enter an order for alimony and solicitors' fees pendente lite for her support and defense on appeal where the appeal is taken by the husband."

In Amberson v. Amberson, 349 Ill. 249, a separate maintenance case, the court approved allowance for solicitors' fees in a reduced amount. In Harding v. Harding, 180 Ill. 481, the court said that the amount of alimony to be allowed in a separate maintenance suit is to be determined in the same manner as in case of divorce and affirmed an allowance to the complainant for $8,000.00 for solicitors' fees.

Defendant states that the judges of the Superior Court "sitting in vacation term erred in assuming jurisdiction over the parties and subject matter predicated on the defendant's petition, based upon a rule to show cause in the absence of properly showing an emergency for such action." The Circuit and Superior courts of Cook County do not adjourn for vacation in the technical sense. See Par. 72.4, Ch. 37, Ill. Rev. Stat. 1953; Chicago Title & Trust Co. v. Cohen, 284 Ill. App. 181, 186.

For the reasons stated the decrees and orders of the Superior Court of Cook County are affirmed.

DECREES AND ORDERS AFFIRMED.

Friend, J., and
Niemeyer, J., Concur.

223 A

46445

7 I.A.2d 17

CHARLES BARATTA,
Appellee,

v.

CHICAGO, ROCK ISLAND & PACIFIC RAILROAD COMPANY, a corporation,
Appellant.

APPEAL FROM
CIRCUIT COURT
COOK COUNTY

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

The plaintiff, Charles Baratta, brought suit under the provisions of the Federal Employers' Liability Act to recover damages allegedly occasioned by the negligence of the defendant railroad company. The jury returned a verdict for plaintiff in the sum of $13,320.00, upon which judgment was entered, and from which defendant appeals.

The accident occurred May 15, 1950 in the yard of the defendant railroad at 51st Street and Wentworth Avenue in Chicago, where plaintiff was employed. He was then seventeen years old, although in his application for employment he had stated that he was nineteen years old. Plaintiff had started working for the defendant railroad on May 8, 1950, a week before the accident, and had been assigned to the electrical department as an electrician's helper. On the day of the accident he was engaged in loading propane gas cylinders onto railroad cars, and in the course of his duties was operating a gasoline truck on which the cylinders were moved. According to his own testimony he had never driven that type of truck prior to the day of the accident; he had operated a truck, but of a different

type, for the railroad company by which he had previously been employed.

The truck in question was operated by means of two levers, one of which regulated the forward and backward movement, as well as the speed of the vehicle, and the second lever which controlled the steering apparatus. Just prior to the accident, about 9:00 a. m., plaintiff was traveling in a southerly direction on a concrete runway between railroad tracks in defendant's yard, approaching a concrete apron running east and west alongside the commissary building. He was standing on the driver's step of the truck, facing south, with the body of the truck behind him. As he approached the commissary building he stopped about six inches from the wall in order to turn the steering bar, which he claimed was stiff and could not be moved with one hand. He thereupon turned around, facing the rear of the truck, took hold of the steering bar which was then on his left-hand side, and tried to pull it toward him to turn the wheels. The motor of the truck was running and, according to plaintiff, the truck was in gear, but the "dead man's"brake was holding the truck motionless. The brake on the truck is so constructed that it must be depressed for the truck to move. Plaintiff testified that as he was standing and attempting to turn the wheel, a man named Pierce came over and stepped on the brake, releasing it and causing the truck to move south against the wall of the commissary building. This caused the operating lever to be pushed into plaintiff's chest. According to plaintiff, Pierce

kept hitting the brake, and every time he stepped on it the lever of the truck would hit him on the side of the chest. In his deposition plaintiff testified Pierce stepped on the brake five times, and each time the lever hit him in the chest. Finally other workers came up, got Pierce away, and pulled plaintiff from between the wall and the truck. He claims that he then fell, hitting his head and back on the apron, and was unconscious until he arrived at the hospital. There is considerable conflict in the evidence, and the record presents a close case on the facts.

As ground for reversal it is urged by defendant that the verdict is against the manifest weight of the evidence; that the court erred in refusing to withdraw a juror, in accordance with defendant's motions; that the court erred in refusing to admit proper, competent, and relevant evidence offered on behalf of defendant and, conversely, that the court committed error in admitting improper and incompetent evidence offered by plaintiff, over defendant's objection; and that plaintiff's attorney was guilty of prejudicial misconduct throughout the course of the trial.

In the view that we take, the judgment will have to be reversed on the last of these contentions. We have studied the record carefully, and it appears that, throughout the trial, plaintiff's counsel indulged in prejudicial and inflammatory remarks addressed to defense counsel, to the court, to witnesses, and to the jury. Improper and prejudicial questions were asked and reasked, despite the adverse rulings

of the court which repeatedly instructed the jury to disregard the remarks. Persistently, nonimpeaching matters were brought to the attention of the jury as though they were impeaching. The testimony of the witnesses was distorted and misquoted in examination and argument. Defendant counsel and the court were incessantly interrupted. From his opening statement to his closing argument plaintiff's counsel attempted to persuade the jury that the defendant, through its attorneys and doctors, was engaged in a conspiracy to deprive plaintiff of his just rights; such a coloration of defendant's motives is not supported by the evidence. On numerous occasions during the trial, plaintiff's attorney, for no discernible reason, designated one of defendant's counsel as the prime mover in the conspiratorial plan with which he charged defendant. Doctors who had treated plaintiff were openly accused, without any evidence, of having withheld x-rays and of having taken x-rays which were designed deliberately to conceal plaintiff's injuries. Throughout the trial abusive and sarcastic remarks were directed to defendant's counsel. It would serve no purpose to further detail the repeated instances of prejudicial conduct. To insure a fair impartial trial a jury must be permitted a calm and deliberate inquiry into the truth of disputed issues of fact. Sincere adversaries, embroiled in the heat of controversy, may inadvertently and occasionally transgress the rules of propriety, but a court must demand that standards of trial decorum and of fairness be observed. Defendant's

counsel contend that in the course of the trial those standards were made a mockery; that plaintiff's counsel exerted no serious effort to present fairly a cause of action for personal injury; and we are persuaded that this characterization of the tenor of the trial is supported by the record. Plaintiff's case was based solely on his own testimony, as against the unimpeached evidence of other witnesses. In the situation it was extremely important that the trial be fairly conducted.

The judgment cannot stand; it is therefore reversed and the cause remanded for a new trial.

JUDGMENT REVERSED AND CAUSE REMANDED FOR A NEW TRIAL.

BURKE, P. J., AND NIEMEYER, J., CONCUR.

224A

46427

ROBERT LEIDER and EDITH LEIDER,
Plaintiffs-Appellees,

v.

DONALD CAMPBELL,
Defendant-Appellee,
and
WILLIAM HADELER,
Defendant-Appellant,

DONALD W. CAMPBELL,
Plaintiff and
Counterdefendant-Appellee,
and
DOROTHY G. CAMPBELL,
Plaintiff-Appellee,

v.

WILLIAM HADELER,
Defendant and
Counterclaimant-Appellant.

7 I.A.2d 18

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

William Hadeler, defendant and counterclaimant (hereinafter called defendant), appeals from separate judgments in favor of plaintiffs Robert Leider (hereinafter called Leider), Edith Leider, Donald W. Campbell (hereinafter called Campbell) and Dorothy G. Campbell entered on verdicts in two consolidated actions for personal injuries and property damage resulting from a collision at the intersection of Barrington Road and Dundee Road, northwest of Chicago, between automobiles owned and driven by defendant and Campbell. He also appeals from a judgment entered on a verdict of not guilty on his counterclaim against Campbell for personal injuries and property damage arising out of the collision. Plaintiffs Robert Leider and Edith Leider cross-

appeal from a judgment entered on verdicts of not guilty in their actions for personal injuries against Campbell.

The Leiders, guests in defendant's automobile, instituted suit against Campbell. Later they amended the complaint by impleading defendant and charging wilful and wanton misconduct on his part. Campbell and Dorothy G. Campbell, his wife, brought suit against defendant for personal injuries and property damage to Campbell's automobile. These actions were consolidated, apparently with the consent of the Leiders and defendant. Before commencement of the trial the Leiders and defendant moved to vacate the order of consolidation. This motion was denied. At the close of all the evidence the motion was renewed and again denied. The consolidation of the cases rested in the discretion of the trial court. We see nothing in the record indicating an abuse of discretion or injury to the defendant as a result of the consolidation.

The collision occurred at a rural intersection about noon on a bright, clear Sunday in August, 1952. Dundee Road is a two-lane east-and-west paved preferential highway. Barrington Road is a two-lane north-and-south paved nonpreferential highway. Defendant was driving north on Barrington Road and Campbell was driving west on Dundee Road. There is a stop sign at the southeast corner of the intersection. There is no traffic sign on Dundee Road. There was no other traffic on either road in the immediate vicinity, and no occurrence witnesses except the occupants of the two cars.

The testimony of the witnesses and photographs in evidence show an 8 or 10 feet rise of the land east of Barrington Road and south of Dundee Road for some distance along each highway, obstructing the view of westbound traffic by northbound drivers and of northbound traffic by westbound drivers. The highways are widened as they near the intersection, so that each is practically a four-lane highway at the crossing. The witnesses place the stop sign at from 10 to 30 feet south of Dundee Road. The prevailing testimony is that the stop sign is not visible to westbound drivers on Dundee Road until within about 75 feet from Barrington Road; that westbound traffic on Dundee Road cannot be seen by northbound drivers at the stop sign.

Defendant was taking his wife, the Leiders and their two children to a picnic near Cary. He had entered Barrington Road some distance to the south and was traveling 40 or 45 miles an hour until he approached the intersection. Defendant, his wife and Leider testify that he stopped at the sign and then started up slowly. Defendant's testimony is that he had not reached a speed in excess of 10 miles per hour; that when he got beyond the land obstruction at the southeast corner of the intersection he looked to the east and saw no approaching traffic; that he then looked to the west, where his view at all times was unobstructed for a considerable distance, and saw no traffic; he was then near or had entered

the south lane of Dundee Road; he looked again to the east and saw Campbell approaching at a distance of about 50 feet; he attempted to turn to the west but collided with Campbell's car.

Campbell and his wife were going to a golf club west of the intersection. He was familiar with Dundee Road and the intersection. He testified that when he reached a sign indicating the intersection with Barrington Road, about 1,000 feet or a quarter of a mile east of that road, he slowed down from about 40 miles per hour to approximately 30 miles at the time of the collision; that he could not see the stop sign until he was within about 75 feet of Barrington Road; that he first saw defendant's automobile north of the stop sign, moving at 30 to 35 miles per hour and too close for him to apply his brakes effectively or avoid the collision. A photograph in evidence shows that his automobile was struck on the left side at the front wheel and toward the rear. Leider, who had been in this country ten months and was accustomed to measuring speed and distance by kilometers, testified that Campbell was traveling at 60 to 70 miles per hour, or 80 kilometers--which would be a little under 50 miles per hour.

There is a direct conflict in the evidence, and all the witnesses are interested parties. The physical facts, as evidenced by the photographs in evidence, coupled with the testimony of the witnesses, indicate that stopping at the traffic sign on the southeast corner of the intersection

would be a useless act. As said in Ritter v. Nieman, 329 Ill. App. 163, 171: "There is no virtue in stopping at a place when one can not see. A stop sign is a challenge to motorists to stop at a point where, by the use of one's faculties, one can definitely ascertain if he can safely proceed into the protected thoroughfare." The photographs further show that after passing the stop sign and before entering into the south lane of Dundee Road, a northbound driver has an unobstructed view to the east as far as and beyond the Barrington Road sign on Dundee Road. Although Campbell could not see whether or not the defendant had stopped at the sign, his testimony that the automobile was traveling at 30 or 35 miles an hour when it came into Campbell's vision contradicts the testimony that defendant stopped. In any event his entry into the preferential highway at the speed testified to by Campbell was evidence of wanton and wilful misconduct. Ritter v. Nieman, supra; Lawson v. Fisk, 316 Ill. App. 591. The verdicts of the jury exonerating Campbell and finding defendant guilty as to all plaintiffs are not against the manifest weight of the evidence.

Leider's rights against defendant are not controlled by his testimony that defendant stopped at the traffic sign. In People v. Scalisi, 324 Ill. 131, 145, the court held that the defendant was entitled to any defense shown by the testimony, even though in contradiction of his own testimony. Here the complaint charged that defendant wilfully and wantonly failed to stop at the sign before entering Dundee Road. This

was a question for the jury to determine from all the evidence, and Leider is entitled to the benefit of the jury's verdict, even though in contradiction of his own testimony.

Defendant complains of the giving of an instruction tendered by the Campbells in the language of the Motor Vehicle Law (Ill. Rev. Stats. 1951, chap. 95 1/2, par. 167) that:

> "The Department may in its discretion and when traffic conditions warrant such action give preference to traffic upon any of the State highways under its jurisdiction, upon which has been constructed a durable hard-surfaced road over traffic crossing or entering such highway by erecting appropriate stop signs or stop lights and in such case vehicles entering upon or crossing such highway shall come to a full stop as near the right-of-way line of such highway as possible and regardless of direction shall give the right-of-way to vehicles upon such highway."

This instruction stated the Campbell's theory of their right of action--the negligence of defendant in entering upon Dundee Road without stopping "as near the right of way line of such highway as possible," and is supported by the testimony of Campbell as to the speed of defendant's automobile when it entered Dundee Road. In asserting the impropriety of giving this instruction defendant erroneously states that "Campbell did not dispute the fact that the Hadeler car stopped at the stop sign." As hereinbefore stated, the testimony of Campbell that defendant's automobile was traveling 30 to 35 miles per hour between the stop sign and the pavement on Dundee Road, contradicts testimony on behalf of the defendant that he had stopped at the traffic sign. This conflict in the testimony as to whether or not defendant stopped before entering

Dundee Road, distinguishes the instant case from Anderson v. Middleton, 350 Ill. App. 59, on which defendant relies in support of his contention that the given instruction should have been supplemented with a statement of the law relating to the right of way as defined by the courts. It is seldom that an instruction in the language of the statute applicable to the facts of the case in which it is given is held to be erroneous. In Minnis v. Friend, 360 Ill. 328, 338, the court said: "Instructing the jury in the words of the law itself should not be pronounced error." An exception is found in the giving of an instruction in the language of section 68 of the Illinois Motor Vehicle Law (Ill. Rev. Stats. 1951, chap. 95 1/2, par. 165) because the language of the statute has been modified by the courts of review, and it has therefore been held that instructions should be framed according to that modification if the jury is to be properly informed as to the legal effect of the statute. Walker v. Shea-Matson Trucking Co., 344 Ill. App. 466. Under the Campbells' contention and also the Leiders' contention that defendant had not stopped at the stop sign or as near the right of way line of such highway as possible, the general subject of right of way at intersections was not pertinent and neither of the plaintiffs was obliged to instruct the jury as to the law of right of way.

We have considered other objections urged by defendant, such as alleged prejudicial remarks of court and counsel, the giving of other instructions, the attempt to

impeach the defendant, and find no reversible error. Specific discussion of the points would unnecessarily extend this opinion. No objection is made to the damages awarded the respective plaintiffs. The Leiders, as cross-appellants, merely adopt a part of defendant's argument in his controversy with Campbell and suggest that a reversal of the judgment in that controversy would entitle them to reversal of the judgment in their action against Campbell. We have rejected defendant's contention in his controversy with Campbell.

The judgments are affirmed.

JUDGMENTS AFFIRMED.

BURKE, P. J., AND FRIEND, J., CONCUR.

225 A

46611

7 I.A. 21 19

MICHAEL F. MULCAHY, late Sheriff of Cook County, for the use of TILLIE ULRICH,
Appellee,

v.

CHARLES J. ULRICH and RAYMOND KLINGBEIL.

RAYMOND KLINGBEIL,
Appellant.

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant Raymond Klingbeil appeals from a judgment for $2,000 entered against him, as surety, on a ne exeat bond in which Charles J. Ulrich was principal.

The case was tried on a stipulation of facts from which it appears that defendant Ulrich has been absent from the State of Illinois, without leave of court, from on or about January 18, 1949. No service was had upon him and the present case was dismissed as to him. The defense in the trial court and on appeal is wholly technical.

The bond signed by defendant was the usual form of a ne exeat bond. It recited that

> "*** if the said Raymond Klingbeil shall not render himself in execution to answer any judgment or decree which the said Court may render against him, then the said Charles Ulrich as Principal and Raymond Klingbeil as surety and each of them, will pay, or cause to be paid, unto the said Michael F. Mulcahy, Sheriff of Cook County, the sum of Two Thousand ($2,000.00) Dollars.
>
> But if the said Charles Ulrich shall not go or depart from, or beyond, the borders of the State of Illinois, without leave of the said Court, and if he will render himself in execution to answer any judgment or decree which the said Court may render against him, then and in that case this obligation shall be void and of no effect; otherwise to remain in full force and virtue."

The purpose of the bond was to secure the presence of the defendant Ulrich in court to answer any judgment or decree which might be rendered against him. It is plain from the context of the bond and the purpose for which it was given that the insertion of the name Raymond Klingbeil where it first appears in the foregoing quotation, was a mistake. Defendant insists that this mistake renders the present judgment void. This contention ignores the established law of the state, as stated in Schill v. Reisdorf, 88 Ill. 411, which involved a suit against a surety on an appeal bond, where the names were correctly given in all other parts of the bond, except that the name Reisdorf, the plaintiff in the suit and obligee in the bond, was inserted instead of the name Walbaum, the defendant and principal in the bond. In holding that this mistake did not invalidate the bond, the court said:

> "This, in principle, if not in fact, is like the bond in the case of Hibbard v. McKindley, 28 Ill. 240. Here, as there, the context of the bond clearly shows that the name Reisdorf was, by mistake, inserted instead of Walbaum, and, under the authority of that case, the objection in this must be held not well taken."

The further objection of defendant that neither the pleadings nor the stipulated facts show that the terms of the bond were to be other than those specified in the bond as pleaded and attached to the complaint, is without merit.

The judgment is affirmed.

AFFIRMED.

BURKE, P. J., AND FRIEND, J., CONCUR.

249 A

46535

71 I.A.21 19

JOSEPH KOPALD and E. KOPALD doing business as NU-WAY SIDING AND CONSTRUCTION CO., Appellants,

v.

ALEXANDER J. O'GRADNEY, DOROTHY J. O'GRADNEY, HENRY P. ZMICH and LAURA ZMICH, Appellees.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

MR. PRESIDING JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

A decree was entered in the Circuit Court dismissing for want of equity plaintiffs' complaint to enforce a claim for a mechanic's lien against the defendants, and entering judgment on the defendants' counterclaim against the plaintiffs and counterdefendants for $350, from which decree this appeal is taken.

The plaintiffs' complaint was upon an executed written contract for raising two old buildings and installing cement foundations thereunder, for the agreed sum of $5,100, and upon a claim for an additional sum of $642.80 for "extras." The defendants filed an answer to the complaint in which, among other things, they aver that the plaintiffs failed to do the work in question in a neat and workmanlike manner, which failure resulted in great damages to the defendants and they will be compelled to employ other contractors to complete the unfinished work of the plaintiffs. The defendants also filed a counterclaim making substantially the same allegations in detail, and claiming damages in the sum of $5,000, to which counterclaim

the plaintiffs filed an answer. The case was referred to a master in chancery who heard evidence and made a report, in which he found that the work was done in a good and workmanlike manner and that the defendants approved and accepted the same; that there is due and owing to the plaintiffs the sum of $5,100, the contract price, together with the further sum of $642.80 for "extras," totaling $5,742.80; that the counterclaim of the defendants should be dismissed for want of equity; and that the plaintiffs are entitled to a mechanic's lien in the sum of $5,742.80, with interest. Objections were filed to the master's report and overruled by the master, and the objections stood as exceptions to the report before the court. The court sustained the exceptions to the master's report and entered a decree dismissing plaintiffs' complaint for want of equity and entering judgment on the defendants' counterclaim against the plaintiffs in the sum of $350.

The contract originally entered into by the parties on June 7, 1952 required the plaintiffs to "raise two feet and level front and rear building. Install cement foundation same to be ten inch front and eight inch rear (3-1/2 ft. to 4 ft.). Install 6 x 6 posts for front building to be set on cement base. Base same with 2 x 4 cement base, and block chimney to base." The contractor was to furnish all necessary labor and material and was to do the work in a neat and workmanlike manner.

There were two buildings to be raised, a front build-

ing and a rear building. The front building was over sixty years old and was built on stilts approximately six feet high. The building foundation had settled over the years from one to seven inches in various parts, and the building had sagged accordingly. The plaintiffs installed a concrete foundation ten inches wide and approximately four feet high under the front building, together with fourteen 2 x 4 concrete piers, or blocks, which were set in the basement on the floor and were not part of the foundation wall. We assume that when the "2 x 4" concrete piers are referred to, their size is meant as 2 x 4 feet, though nothing appears anywhere in the record to that effect. Resting on the top of these piers were 6 x 6 posts which supported the beams of the house. The rear building had no foundation and under it the plaintiffs constructed a concrete base.

The defendants' principal complaints are that the plaintiffs failed to raise the front and rear buildings in a workmanlike manner; that the concrete foundations installed were improperly constructed; that the floor in the rear building was completely removed and never restored; that the concrete foundation under the front building extended three inches beyond the outside walls of the building; that because of the inefficient workmanship of the plaintiffs the plaster in the front building was cracked; and that the buildings were not level.

There is evidence in the record that the fourteen concrete piers installed by the plaintiffs vary about three inches in height and in some instances protrude above the

foundation wall; that the foundation wall varies in elevation as much as three inches; that because of this variation the floors are not level and the doors sag and cannot be kept open; that plastering fell off the ceilings and walls, which necessitated the partial replastering of seven rooms and the complete replastering of one room; and that rainwater will not run out of the gutters because the building is not level.

The evidence is in sharp conflict. One of the defendants' witnesses, a structural engineer, prepared two blueprints which were introduced in evidence, indicating the elevations of the foundation wall and the floor in the front building. These blueprints were prepared by him from an examination of the premises made by him with instruments. The blueprints show a variance of as much as three inches in the elevation. A witness for the plaintiffs, a licensed architect, on examining the blueprints could find only a difference in elevation of one-tenth of an inch. No objections to the accuracy of the blueprints were made, and they speak for themselves. They show a variation of as much as three inches in the elevation. There was considerable testimony in the record with reference to the propriety of constructing under this frame building a concrete foundation extending three inches beyond the frame wall on the outside. There was testimony for the plaintiffs to the effect that such practice was proper, and testimony on the part of the defendants was that such practice was not common nor proper.

There was also evidence as to conversations between the plaintiffs and the defendants concerning this wall extension, and the plaintiffs, at the suggestion of the defendants and at the plaintiffs' expense, put a copper flashing over it correcting the condition, and we find that such correction was accepted by the defendants, whether the original installation was proper or improper.

The plaintiffs argue that the defendants had agreed to accept all of the work if they would install such flashing. The record does not bear them out in this connection. There was an attempt on the part of the defendants to settle the dispute, and an offer was made to the plaintiffs which was rejected. Such settlement attempt will not be considered by the court.

The allegation of the plaintiffs in their complaint with reference to their claim for $642.80 for "extras" installed at the instance and request of the defendants is not denied in the defendants' answer, and is therefore admitted. No reference is made in the briefs to such admission. In order to find it, it was necessary to search the record.

The trial court did not indicate how he arrived at the sum of $350 which he found the defendants should recover from the plaintiffs. On this question counsel in their briefs have shed no light, and, when questioned on oral argument, could furnish us no computation.

The master's report was overruled by the trial

court, and under such circumstance we may take into consideration the master's report, but no particular measure of weight is to be attached to it. The master's report is merely advisory to the trial court. The facts are all open for consideration in the first instance by the trial court and now by this court. The question before us is whether the decree rendered by the chancellor is a proper one under the law and the evidence. Merschat v. Merschat, 1 Ill. App. 2d 429; Brown v. Moore, 407 Ill. 618.

The evidence in the record is sufficient to support the court's order sustaining the exceptions to the master's report. The plaintiffs did not do the work in the manner contemplated by the contract. The building was not leveled as it should have been. The failure to level the front building is the cause of the slanting floors. We are unable to tell from the record what it would cost to put the building in proper condition. The trial court should reopen the case to permit the taking of further evidence to determine what necessary expenditures the defendants will be required to make to level the front building and the floors, and the amount found should be applied against the sum of $5,742.80, the contract price plus "extras." The court should then find for the plaintiffs on their original complaint or for the defendants on their counterclaim as the case might be, and enter the necessary and appropriate judgment. As we have indicated, there should be no allowance made the defendants with reference to the extension of the foundation wall.

The decree is reversed and the cause remanded to the Circuit Court for further proceedings in conformity with the views herein expressed. Costs of this appeal, including the additional abstract filed by defendants, shall be paid one-half by plaintiffs and one-half by defendants.

Decree reversed and cause remanded.

Robson and Schwartz, JJ., concur.

250 A

46548

7 I.A.2d 20

ERNEST STOCCO, Appellee,	)	APPEAL FROM SUPERIOR
v.	)	COURT, COOK COUNTY.
WILLIAM J. BUTTENBENDER, Appellant.	)	

MR. PRESIDING JUSTICE McCORMICK DELIVERED THE OPINION OF THE COURT.

Suit was brought by Ernest Stocco against William J. Buttenbender for damages on account of an accident which occurred April 4, 1950 when a truck operated by the plaintiff collided with an automobile operated by the defendant at a street intersection in the Village of Skokie, Cook County, Illinois. The trial resulted in a verdict in favor of the plaintiff for $11,000. The trial court, at the close of all the evidence, overruled the motion of the defendant for a directed verdict, and, after the verdict was returned, overruled the defendant's motions for judgment notwithstanding the verdict and for a new trial. It thereupon entered judgment on the verdict, from which judgment the defendant now appeals.

The defendant contends that the plaintiff had failed to prove negligence on the part of the defendant and contends that the plaintiff was guilty of contributory negligence as a matter of law. The defendant also urges that the verdict is against the manifest weight of the evidence and is grossly excessive.

The plaintiff and the defendant were the only eyewitnesses to the accident who testified at the trial. They both testified as to the positions of the two vehicles as they

approached the intersection, as well as to the speed at which each was driven. Their testimony is irreconcilable.

The plaintiff testified that prior to the accident he was driving a truck north on Kilpatrick street; that as he came within 60 feet of Madison street he stopped to allow a southbound truck to pass by him; that he then moved his truck up to the south curb of Madison street, where he again stopped; that he looked to his right and saw the defendant's automobile 150 or 160 feet away, westbound on the proper side of Madison street, and moving at the rate of 15 miles an hour; that the two vehicles were the only ones in the vicinity; that he then crossed Madison street at 7 miles an hour; that he crossed over the center of Madison street, and when he came to the westbound lane, the lane in which the defendant's car was approaching, he looked to his right and saw the defendant's car within 10 feet of him, traveling towards him at a speed of over 35 miles an hour; that the defendant's automobile struck the rear of the truck, and the latter was overturned.

The defendant testified that he was traveling at a speed of 20 to 25 miles an hour as he approached to a point within 150 feet of the intersection; that he did not see the truck of the plaintiff until the truck was directly in front of him, approximately 15 to 20 feet away; that he was still going at 20 or 25 miles an hour.

There was also evidence in the record from a police officer of the Village of Skokie, who arrived at the scene of the accident after the accident had occurred. His testimony

was that the defendant's automobile had skidded from the east curb of Kilpatrick street a distance of about 46 feet.

The question of the negligence of the defendant and the due care of the plaintiff was a matter for the jury to determine. The trial court, which had heard and observed the witnesses during the trial of the case, overruled the defendant's motions for a directed verdict and for judgment notwithstanding the verdict. "Only when there is a complete absence of probative facts to support the conclusion drawn by the jury is it reversible error to overrule a motion for judgment notwithstanding the verdict." Lindroth v. Walgreen Co., 407 Ill. 121. The plaintiff's evidence established a prima facie case, and the trial court was not in error. It is well settled that where the evidence is conflicting and the finding of the jury is not clearly against the preponderance of the evidence, the trial court should not, and this court will not, set aside the verdict. City of Monticello v. LeCrone, 414 Ill. 550. Here the evidence is in sharp conflict. However, there is sufficient evidence in the record to support the jury's finding. The trial court properly overruled the defendant's alternative motion for a new trial.

It is now necessary to consider the contention of the defendant that the verdict is grossly excessive and for that reason the cause should be reversed.

The evidence in the record is that the plaintiff was 24 years old and married; that he suffered pain at the time of the accident and still suffers severe pain. The physician

who treated the plaintiff testified that shortly after the accident he had x-ray films taken of the plaintiff's back; that his diagnosis was that the plaintiff had suffered an intervertebral disc injury; that he prescribed a brace, which the plaintiff wore for about eight months and still wears once or twice a week; and that the plaintiff is still under his treatment. The testimony of the plaintiff is to the effect that he had lost 18 weeks' work and that he now works steadily; that he has pains when he bends down; that he uses an electric pad at home; that he cannot walk up stairs without pain; that about once a month he has a severe attack of pain in his back and in his leg; that while prior to the injury he wrestled, played football and bowled, he is now unable to engage in any athletics.

On behalf of the defendant a physician testified that he had shortly after the accident examined the plaintiff at the request of the defendant; that he found no injuries at all; that he took x-rays of the plaintiff's lower back, which exhibited no abnormalities whatsoever; and that the plaintiff could have gone back to work immediately.

Two other physicians testified as experts on behalf of the defendant that they had not examined the patient, but that on examination in court of the x-ray films which had been introduced in evidence by the plaintiff and the defendant, they could find nothing indicating an abnormal condition of the spine. However, on cross-examination one of them stated that an attending physician treating the patient would be able to

make a more accurate diagnosis than a physician taking two x-ray films and making one examination, providing the physicians were equal in professional ability. The other physician testified that if he had been treating an individual for a year for complaints about his back, he would be in a position to determine from the patient's complaints whether or not the patient had a herniated disc and that, taking into consideration the normal x-rays and the treatments, he could not determine whether or not there was a herniated disc.

The physician who testified in behalf of the plaintiff stated that in his opinion the condition of the plaintiff would be permanent. If the condition of the plaintiff is permanent, the verdict certainly would not be excessive. The defendant does not here complain that any improper evidence was introduced in the case, nor that the jury was improperly instructed. The only question raised by the defendant on this point is that the verdict is excessive. We here have a direct conflict between the testimony of two physicians, one who treated the patient for four years, and the other who examined the patient once and took two x-rays of his back. Defendant's two expert witnesses testified that from an inspection of the x-ray films they could not reach the same diagnosis as that to which the plaintiff's attending physician had testified. There is nothing in the record which reflects upon the competency or ability of the attending physician. We have repeatedly held that unless the verdict is so excessive as to show passion and prejudice on the part of the jury the Appellate Court has no right to disturb it.

Garner v. Burns Mid-Town, Inc., 346 Ill. App. 162; Smith v. Kroger Grocery & Baking Co., 339 Ill. App. 501; Hannigan v. Elgin, J. & E. Ry. Co., 337 Ill. App. 538; Gorczynski v. Nugent, 335 Ill. App. 63; Gleason v. Cunningham, 316 Ill. App. 286; Bolle v. Chicago & Northwestern Ry. Co., 258 Ill. App. 545. We have said, "damages awarded to a plaintiff in a personal injury suit will not be set aside unless so palpably excessive as to indicate some improper motive on the part of the jury." Garner v. Burns Mid-Town, Inc., supra. If the jury believed the testimony of the plaintiff and that of his attending physician, as they had a right to do and as they apparently did, the verdict is not excessive. In reaching their verdict the jury had before them for their consideration the testimony of one of the two physicians called by the defendant as experts, to the effect that the treating physician might make a more accurate diagnosis than a physician who merely made one examination and took two x-rays, as well as the testimony of the other physician that if he had been treating an individual for a year for complaints about his back he would be able to determine from the patient's complaints whether or not he had a herniated disc.

In this case there was nothing in the record which would possibly prejudice or inflame the jury. We find no reversible error in the record, and the court properly overruled the defendant's motions for directed verdict, for judgment notwithstanding the verdict and for a new trial. The judgment of the trial court is affirmed.

Judgment affirmed.

Robson and Schwartz, JJ., concur.

O.K. W.M.C.

268 A

Abstract

General No. 10861 Agenda No. 20

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

May Term, A. D. 1958

7 I.A.2d 21

HELENE V. TURCHI, Plaintiff-Appellant, vs. ROMAN L. TURCHI, Defendant-Appellee.	APPEAL FROM THE CIRCUIT COURT OF LAKE COUNTY.

DOVE, J.

Helene V. Turchi appeals from a decree entered by the Circuit Court of Lake County dismissing her complaint for separate maintenance.

The complaint which was filed on September 17, 1953, alleged, among other things, that the parties were married on August 10, 1948, had lived together as husband and wife until August 15, 1953, and that as a result of said marriage, one daughter was born to the parties. The complaint charged that the defendant, Roman L. Turchi, wilfully deserted the plaintiff without just cause on August 15, 1953, and that plaintiff, without any fault on her part, was living separate and apart from the defendant and had been so living since August 15, 1953. An answer was filed admitting the marriage and birth of their daughter and that the parties were living separate and apart, but traversing the other allegations of the complaint. A counterclaim was filed by the defendant charging the counter-defendant with adultery and praying for a divorce. Subsequently

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

May Term, A. D. 1909.

Plaintiff-Appellant,	Appeal from the
vs.	Circuit Court of
Defendant-Appellee.	Lake County.

NOTE, 1.

Haines T. Turcot appeals from a decree entered in the Circuit Court of Lake County dismissing her complaint for statutory maintenance.

The complaint which was filed on September 17, 1908, alleged, among other things, that the parties were married on August 10, 1898, had lived together as husband and wife until August 10, 1903, and that as a result of said marriage, one daughter was born to the parties. The complaint charged that the defendant, Joseph L. Turcot, wilfully deserted the plaintiff without just cause on August 10, 1903, and that plaintiff, without any fault on her part, was living entirely separate and apart from the defendant and had been so living since August 10, 1903. As answer was filed admitting the marriage and birth of their daughter and that the parties were living separate and apart, but stating the other allegations of the complaint and filed by the defendant charging the complainant with adultery and praying for a divorce. Thereupon

an amended counterclaim was filed charging the counter-defendant with desertion. Upon the hearing the amended counterclaim was dismissed and as no cross-appeal has been filed, no further attention need be paid to the counterclaim.

At the hearing, January 26, 1955, the defendant, called by the plaintiff for cross-examination as an adverse witness under Section 60 of the Civil Practice Act, testified that he was married to appellant on August 10, 1949; that they had one child and that he and his wife lived together until August 15, 1953; that after that date he returned to his home to pick up his daughter on Sundays, but never offered to unconditionally return to their home and live with his wife; that he had never had sexual intercourse with his wife after August 15, 1953, and a few days after August 15, 1953, he was told by his wife to get out of their home and that he did get out.

The plaintiff was the only other witness in her own behalf. From her testimony it appears that the parties owned two properties; one located at 500 Waukegan Avenue and the other, a new motel, at 15 Clay Avenue, Highwood, Illinois. The title to the motel property was in the plaintiff, the defendant and the parents of the defendant, who were living at the motel. The title to the other property was in the plaintiff, as we understand the record. Apparently this fact caused some disturbance in the marital relationship, as the plaintiff testified that her husband wanted her to "take her name off of that motel property"; that she declined and told her husband "we were all partners." The plaintiff further testified that after August 15, 1953, her husband returned to the Waukegan Avenue property, where they were living on August 15, 1953, and where she continued to live until June 1954; that on February 1954, he offered to return

until June 1984; that on February 1985, he offered to return
were living on August 18, 1982, and where she continued to live
by the plaintiff for cross-examination as an adverse witness
under Section 46 of the Civil Practice Act, testified that he
was married in Brooklyn on August 18, 1962; that they had one
child and that he and his wife lived together until August 19,
1982; that after that date he returned to his home to stay up
one Saturday or Sunday, but never offered to unconditionally
return to their home and live with his wife; that he has never
had sexual intercourse with his wife after August 18, 1982, and a
few days after August 18, 1982, he was told by his wife to get
out of their home and that he did get out.

The plaintiff was the only other witness in her own
behalf. From her testimony it appears that the parties owned
two properties; one located at 830 Dawson Avenue and the other,
a new motel, at 18 Clay Avenue, Richmond, Illinois. The title
to the motel property was in the plaintiff, the defendant and
the widow of the defendant, who were living at the motel. The
title to the other property was in the plaintiff as co-tenant
with dower. Explaining this fact caused some difficulty in
the matter relationship, as the plaintiff testified that her
husband wanted her to "take her name off of that motel property";
that she declined and told her husband "go there all yourself."
The plaintiff further testified that after August 18, 1982, her
husband returned to the Dawson Avenue residence, where they

an amended counterclaim was filed charging the counter-defendant
with desertion. Upon the hearing the amended counterclaim was
dismissed and no cross-appeal has been filed, no further
attention need be paid to the counterclaim.

At the hearing, January 29, 1985, the defendant called
by the plaintiff for cross-examination as an adverse witness

and live with her if "I would come to my senses and put the property under his name." The plaintiff further testified that in June 1954, she moved from the Waukegan Avenue property to the motel and was living there at the time of the hearing. The plaintiff further testified that her husband came to the place where she was living in September, 1953; February 12, 1954; February 14, 1954 and again on December 4, 1954, and that upon each occasion they had sexual intercourse.

The defendant testified in his own behalf that he was in partnership with August Cervetti in servicing juke boxes and that they kept parts and records for the machines which they serviced in the basement of the Waukegan Avenue property; that prior to August 15, 1953, his wife wanted him to purchase the interest of his parents in the Clay Avenue property and was dissatisfied with the way the title to that property was held and threatened to lock him out of their home. He further testified that on August 15, 1953, he had no discussion with his wife with reference to his leaving the home, but left in the morning of that day and spent the day servicing juke boxes and came back in the afternoon and left again between six and 6:30 o'clock that evening, returning home about 1:15 o'clock the following morning; that upon his return home he was accompanied by his partner in the juke box business, August Cervetti; that his wife had previously taken his front door key off his key ring and he only had a key to the basement door; that he tried to get in his home and found all three doors locked and the basement door bolted, and being unable to gain access to his home, he went to his partner's home and spent the night there. He further testified that the following day he returned to his home and found the basement door open, but didn't see his wife or have any conversation

and live with her if I would mind to my mother and put the property under his name." The plaintiff further testified that in June 1954, she moved from the Woodland Avenue property to the hotel and was living there at the time of the hearing. The plaintiff further testified that her husband came to the place where she was living in September, 1955; February 11, 1956; February 14, 1956 and again on December 4, 1956, and that upon each occasion they had sexual intercourse.

The defendant testified in his own behalf that he was in partnership with August Carretti in servicing juke boxes and that they kept parts and records for the machines which they serviced in the basement of the Woodland Avenue property; that prior to August 13, 1953, his wife wanted him to purchase the interest of his parents in the Clay Avenue property and was dissatisfied with the way the title to that property was held and threatened to lock him out of their home. He further testified that on August 13, 1953, he had no discussion with his wife with reference to his leaving the home, but left in the morning of that day and spent the day servicing juke boxes and came back in the afternoon and left again between six and 6:30 o'clock that evening, returning home about 1:15 o'clock the following morning; that upon his return home he was accompanied by his partner in the juke box business, August Carretti; that his wife had previously taken his front door key off his key ring and he only had a key to the basement door; that he tried to get in his home and found all three doors locked and the basement door bolted, and being unable to gain entrance to his home, he went to his partner's home and spent the night there. He further testified that the following day he returned to his home and found the basement door open, but didn't see his wife or have any conversation

with her on that occasion. Defendant further testified that he went to his home four or five days later and upon that occasion his wife "told me to get out, that is all, take my clothes and get out." He further testified that having been told to get out, he did so and never went back to live with her as her husband and that she never unconditionally requested him to come back to her house. He denied that he ever had any sexual relations with his wife since he left in August 1953. He further testified that prior to August the 15th, 1953, his wife had stated that she was going to look him out of their home and on that date and prior thereto there was a Yale lock on the basement door to which both he and his partner had a key, but at that time there was no additional lock; that on August the 15th, a bolt had been placed on the door without his knowledge so that the door could be bolted from the inside and that a few days after August the 15th, he and his partner started to move their business from the basement of the Waukegan Avenue property to the Clay Avenue property.

August Cervetti corroborated the testimony of the defendant to the effect that he was a partner of the defendant in the juke box business which they had been conducting for seven years; that on August 15, 1953, he was with the defendant servicing juke boxes and upon their return to the Waukegan Avenue property early in the morning of August 15, 1953, he went with the defendant to the basement entrance; that he had a key to the basement door, but was unable to open the door; that the defendant went to all the outside doors, but was unable to gain admission and then went with Cervetti and remained overnight with him; that the next day they returned to the Waukegan Avenue property and found the basement door open and for the first

time this witness observed the bolt across the inside of the door. This witness further testified that about three days after the incident of the basement door being locked, he had a conversation with the plaintiff at which time they were discussing the defendant, and the plaintiff stated that it was "all foolishness getting back together because the defendant didn't have the mentality of a child, her child, which at that time was 13 years old, and she told me to tell him to go back to his mother's apron strings." This witness further testified that he and the defendant didn't start moving their stuff from the basement to the Clay Street property until after August 15, 1953.

In rebuttal Mrs. Turchi denied that she locked her husband out of the home on August 15, 1953; denied that she knew her husband had returned that night, denied that she had ever removed any keys from her husband's key ring and explained that it was not until a month after her husband and Cervetti moved their equipment from the basement that she put a slide bolt on the basement door. She further testified that she didn't recall whether she ever told Mr. Cervetti that her husband didn't have the mentality of a child and that he should go back to his mother's apron strings.

The record further discloses that after the separation, the premises spoken of in this record as the Waukegan Avenue and Clay Street properties, were the subject matter of litigation culminating in a settlement whereby, for a substantial consideration, title to both properties became vested in the plaintiff.

Counsel for appellant insist that the foregoing evidence shows that defendant left his home without justification; that he did so in order to coerce his wife to part with title to

by his or to order to remove all wire to part with title to those whose defendant title by a deed of trust [metlitation; that

Counsel for defendant insist that the [illegible] language [illegible] is plain, unambiguous [illegible] in the [illegible].

[illegible] is [illegible] to [illegible] [illegible] [illegible]

property which she owned; that plaintiff was not guilty of any misconduct and that the trial court erred in failing to find that plaintiff was living separate and apart from the defendant without her fault.

Counsel for appellee insist that the evidence shows that the parties hereto were living separate because of the fault of the plaintiff in excluding the defendant from the family home on August 15, 1953, and shortly thereafter, upon the return of the defendant to the family home, he was told by the plaintiff to take his clothes and get out; that the only excuse offered for this conduct is that defendant requested the plaintiff to divest herself of title to a piece of property, the title to which was in plaintiff, the parents of the defendant and the defendant.

Neither party to this record ever executed any physical violence toward the other or employed, so far as the record discloses, any intemperate, abusive, profane or obscene language. From the evidence, the chancellor was warranted in finding that plaintiff had requested the defendant on different occasions prior to August 15, 1953, to purchase the interest of his parents in the Clay Avenue property and on being told that he would not be able to buy them out unless they wanted to sell, the plaintiff then threatened to look her husband out of their home and on August 15, 1953, she did so; that the husband returned shortly thereafter and his wife told him to take his clothes and get out and he did as she requested; she never requested him to live with her, but that thereafter they were together on various occasions prior to the hearing (which did not take place for more than seventeen months after the complaint was filed) and resumed their marital relations.

eye never redmembered him to jive with her, but

Under the Statute an allowance for separate maintenance can be made to a wife only in case the separation was without her fault. If she voluntarily consents to the separation she is not without fault within the meaning of the Statute (Vock v. Vock, 365 Ill. 432, 434). In Johnson v. Johnson, 125 Ill. 510, 514, it was held that in order to sustain a decree for separate maintenance, it was necessary for the plaintiff to show not only that she had good cause for living separate and apart from her husband, but that such living apart was without fault on her part.

It might be concluded from the evidence found in this record that appellee was not particularly grieved when he was unable to enter the family home on the night of August 15, 1953, nor disappointed a few days later when his wife told him to take his clothes and get out. The fact that plaintiff was a joint owner with her husband in certain property and that he requested her to divest herself of her title and her refusal to do so would not justify her in excluding her husband from their family home, nor would his failure to acquire for himself or his wife the interest of his parents in this same property, justify her in requesting him to take his clothes and get out.

The circumstances, as disclosed by this record, under which appellee left the family home preclude appellant from maintaining this suit. A separation by the consent of both parties is a bar to the wife's suit for separate maintenance. If appellee was at fault in proposing or insisting that appellant convey her interest in property, which they held jointly, to him, appellant was equally at fault in her conduct and where the fault of the wife is equal to or greater than that of the husband and her conduct materially contributes to the separation, the wife

only that

cannot maintain a suit of this character. (Bielby v. Bielby, 333 Ill. 478; Elston v. Elston, 344 Ill. App. 233; Decker v. Decker, 279 Ill. 300; Hellrung v. Hellrung, 321 Ill. App. 333)

It might be noted that the complaint, filed a month and two days after August 15, 1953, in addition to praying for separate maintenance for the plaintiff and for support for the minor child of the parties, also sought an order pending the disposition of the case, enjoining "the defendant from in any way molesting or annoying or doing the plaintiff any harm or personal injury or from going to their marital home." On the day following the filing of the complaint, notice was given to the defendant by counsel for the plaintiff that the plaintiff would appear in court on September 23, 1953, and move the court for an order for temporary support money, attorney fees and for a writ of injunction as prayed in the complaint. On September 25, 1953, an order was entered directing the defendant to pay the plaintiff attorney fees and also $60.00 per week for the support of herself and minor child. This order apparently satisfied the plaintiff and while no temporary restraining order was ever issued, certainly the plaintiff, at the time the complaint was filed, indicated by the relief she sought that it was her wish that defendant continue to remain away from home.

In our opinion the evidence sustains the decree of the chancellor and that decree is affirmed.

Decree affirmed.

Ewaldi, J. Concurs

certainly

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

A 270

May Term, A. D. 1955.

General No. 10017

Agenda No. 9

Frank Wade,

Plaintiff-Appellee,

vs.

Loyd Mathis,

Defendant-Appellant.

7 I.A. 2d 113

Appeal from the Circuit Court of Schuyler County.

REYNOLDS, J.

Frank Wade, a former employee of Loyd Mathis, recovered a judgment against Mathis in the Circuit Court of Schuyler County, in the amount of $381.40 and costs, for wages claimed to be due Wade growing out of employment from December 27th, 1948 to April 23rd, 1949. The suit was filed March 9th, 1953, almost four years later. The defendant Mathis has appealed to this court.

Before considering the matter on its merits, we must first pass upon the motion of the plaintiff to strike the trial court record, abstract of record and appellant's brief, on the grounds that the trial court record is not properly authenticated and is incorrect; that the abstract of record is incorrect and contains matters not properly transcribed; that the trial court record, abstract of record and the appellant's brief are vague and confused. This court has examined the authentication of the

A 370

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT.

May Term, A. D. 1955.

General No. 10,017 Agenda No. 9

Frank Wade,

Plaintiff-Appellee,

vs.

Loyd Metts,

Defendant-Appellant.

} Appeal from the Circuit Court of Tompkins County.

HEYNOLDS, J.

Frank Wade, a former employee of Loyd Metts, recovered a judgment against Metts in the Circuit Court of Tompkins County, in the amount of $381.40 and costs, for wages claimed to be due Wade growing out of employment from December 27th, 1948 to April 23rd, 1949. The suit was filed March 9th, 1953, almost four years later. The defendant Metts has appealed to this court.

Before considering the matter on its merits, we must first pass upon the motion of the plaintiff to strike the trial court record, abstract of record and appellant's brief, on the ground that the trial court record is not properly authenticated and is incorrect; that the abstract of record is incorrect and contains matters not properly transcribed; that the trial court record, abstract of record and appellant's brief are vague and confused. This court has stricken the authentication of the

-1-

record and finds that the same is authenticated by the trial judge and the same is accompanied by the certificate of the court reporter. We think this is sufficient. As to the other matters, if the plaintiff felt that any matter had been improperly abstracted or had been omitted, he was at liberty under the rules to file a supplemental abstract of record. The motion to strike the trial court record, the abstract of record and the appellant's brief, will be denied.

This suit grows out of employment of the plaintiff by the defendant on work at Carlyle, Illinois and Cochrane, Wisconsin. The plaintiff and the defendant lived at Browning, Illinois, which is some two hours drive by automobile from Carlyle. The defendant was building a levee for the United States Engineers at Carlyle and was digging a ditch near Cochrane, Wisconsin at the same time and apparently the plaintiff worked at both places.

On the Carlyle job, the plaintiff was a bulldozer operator. At Cochrane, he acted as laborer, timekeeper and foreman, and was paid either $1.50 per hour or $10.00 per day, depending upon what he was doing. On the Carlyle job, he was paid at the then union rate. He claimed in his bill of particulars that the union rate was $2.55 per hour. The evidence shows that at the time he worked as the operator of the bulldozer, the rate was $2.15 per hour.

The plaintiff kept a time sheet or record of the time he claims he worked but was not paid. He apparently did not keep any accurate record of the time he was paid for working. In his statement of account he gives credit to the defendant for $445.45 received in wages, leaving a balance claimed of $726.75.

record and finds that the case is authenticated by the trial judge and the case is accompanied by the certificate of the court reporter. We think this is sufficient. As to the other matter, if the plaintiff felt that any matter had been improperly eliminated or had been omitted, he was at liberty under the rules to file a supplemental abstract of record. The motion to strike the trial court record, the abstract of record and the appellant's brief, will be denied.

This suit grows out of employment of the plaintiff by the defendant on work at Carlyle, Illinois and Cochrane, Wisconsin. The plaintiff and the defendant lived at Brownley, Illinois, which is some two hours drive by automobile from Carlyle. The defendant was building a levee for the United States Engineers at Carlyle and was digging a ditch near Cochrane, Wisconsin at the same time and apparently the plaintiff worked at both places.

On the Carlyle job, the plaintiff was a bulldozer operator. At Cochrane, he acted as laborer, timekeeper and foreman, and was paid either $1.50 per hour or $10.00 per day, depending upon what he was doing. On the Carlyle job, he was paid at the then union rate. He claimed in his bill of particulars that the union rate was $2.25 per hour. The evidence shows that at the time he worked as the operator of the bulldozer, the rate was $2.12 per hour.

The plaintiff kept a time sheet or record of the time he claims he worked but was not paid. He apparently did not keep any accurate record of the time he was paid for working. In the statement of account he gives credit to the defendant for $[illegible] received in wages, leaving a balance claimed of $[illegible].

The defendant introduced checks in the total amount of $340.55, not shown on the plaintiff's account and the plaintiff admits that his or his wife's endorsement appears on the backs of said checks. Therefore, he must have received this amount from the defendant.

There is little dispute as to the law in this case. The dispute is almost entirely on the facts. The plaintiff claims that he was not paid and brings in a book or time account kept by his wife, at his direction, to prove his claim. The defendant contends that he paid the plaintiff every cent that he owed him. It is conceded by the plaintiff and his wife, that the time account kept by them was never presented to the defendant. The defendant claims that the time sheet was not admissible in evidence because it was self serving and that the record shows that it was not a just and true account. In the view we take of this case, it is not necessary to pass on the question of whether or not the account book was admissible in evidence. The plaintiff admits that the time sheets kept by him, or by his wife, at his direction were incorrect; that he failed to list check payments to him; that the account was incorrect as to the rate of pay; that he received a check or checks in Wisconsin that he failed to enter in his account; that at least six checks were received on the Carlyle job, or between the Carlyle job and the Cochrane job, that he failed to credit or list in his accounting. By his own admission he charged bulldozer time for trips to Carlyle from Browning with the defendant, although he did very little or no work on these occasions.

The defendant introduced checks in the total amount of $30.15, not shown on the plaintiff's account and the plaintiff admits that his or his wife's endorsement appears on the backs of said checks. Therefore, he must have received this amount from the defendant.

There is little dispute as to the law in this case. The dispute is almost entirely on the facts. The plaintiff claims that he was not paid and brings in a book or time account kept by his wife, at his direction, to prove his claim. The defendant contends that he paid the plaintiff every cent that he owed him. It is conceded by the plaintiff and his wife, that the time account kept by them was never presented to the defendant. The defendant claims that the time sheet was not obtainable in evidence because it was self serving and that the record shows that it was not a just and true account. In the view we take of this case, it is not necessary to pass on the question of whether or not the account book was admissible in evidence. The plaintiff admits that the time sheets kept by him, or by his wife, at his direction were incorrect; that he failed to list check payments to him; that the account was incorrect as to the rate of pay; that he received a check or checks in Wisconsin that he failed to enter in his account; that at least six checks were received on the Darlyle job, or between the Darlyle job and the Cochrane job, that he failed to credit or list in his accounting. By his own admission he charged half-hour time for trips to Darlyle from Lyndon with the defendant, although he did very little or no work on those occasions.

Further, the plaintiff admits that he waited almost four years before he demanded the money he claimed due him as wages. This is hard to explain in view of the testimony that he would leave the job at Cochrane, Wisconsin and come home if his money was a week or ten days late.

The cause was tried before the court without a jury. It is true that where the evidence is conflicting that the findings of the trial court will not be disturbed unless such findings are manifestly against the weight of the evidence. Eleopoulos v. City of Chicago, 3 Ill. 2nd, 247; Arliskas v. Arliskas, 343 Ill. 112. But in this case, the evidence is so unsatisfactory, the proof of the plaintiff as to money due for wages is so full of inconsistencies, errors, mistakes, failures to keep accurate records and contradictions, that it becomes the duty of this court to hold that the findings are manifestly against the weight of the evidence. It is neither logical or reasonable to believe that the plaintiff would wait almost four years to claim his wages, if in fact any were due him. Neither is it logical or reasonable to accept the account made up by the plaintiff, when he admits that it is not complete or accurate. It is difficult to believe that the plaintiff would keep records of payments to him in cash but would fail to keep the records of check payments.

Having fully considered all of the evidence in this case and the many inconsistencies in the plaintiff's evidence, we have come to the condlusion that we must reverse the finding of the trial court as being against the manifest weight of the evidence and remand this cause for a new trial.

Reversed and remanded.

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The cause was tried before the court without a jury. It is true that where the evidence is conflicting that the findings of the trial court will not be disturbed unless such findings are manifestly against the weight of the evidence. Hammond v. City of Chicago, 2 Ill. 2nd, 247; Phillips v. Phillips, 343 Ill. 117. But in this case, the evidence is so unsatisfactory, the proof of the plaintiff as to money due for wages is so full of inconsistencies, errors, admissions, failures to keep accurate records and contradictions, that it becomes the duty of this court to hold that the findings are manifestly against the weight of the evidence. It is neither logical or reasonable to believe that the plaintiff would wait almost four years to claim his wages, if in fact any were due him. Neither is it logical or reasonable to accept the account made up by the plaintiff, when he admits that it is not complete or accurate. It is difficult to believe that the plaintiff would keep records of payments to him in cash but would fail to keep the records of check payments.

Having fully considered all of the evidence in this case and the many inconsistencies in the plaintiff's evidence, we have come to the conclusion that we must reverse the finding of the trial court as being against the manifest weight of the evidence and remand this cause for a new trial.

Reversed and remanded.

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17 I.A.2d 225

ROBERT DICKSON, a minor, by LESLIE R. DICKSON, his father and next friend, Appellee,	) APPEAL FROM MUNICIPAL) COURT OF CHICAGO.
v.	
JOHN P. MENDENHALL, Appellant.	

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a verdict and judgment entered for plaintiff in the trial by a jury of a personal injury action. Urging reversal and remandment of the cause for a new trial, defendant contends (1) that the trial judge gave numerous erroneous instructions; (2) that the trial judge twice left the bench during the taking of the testimony of certain critical witnesses; (3) that the trial judge, in directing a verdict for plaintiff on defendant's counterclaim, acted erroneously, improperly and in a manner calculated to show his predisposition toward plaintiff and plaintiff's cause of action; (4) that the verdict of the jury in awarding $3,000 to plaintiff was grossly excessive and the result of prejudice and passion and should be set aside.

Defendant at the time the instructions were given did not object to them. But, citing the case of Chevalier v. Chicago Transit Authority, 338 Ill. App. 119, he contends that objections to instructions are no longer necessary if set out under the heading "Motion for New Trial." Ibid., at 124. The Chevalier case, supra, involved an appeal from the Circuit Court of Cook County, not from

the Municipal Court of Chicago. Rule 62(3), Civil Practice Rules of the Municipal Court of Chicago, provides that objections to instructions must be specific and must be made out of the presence of the jury and before it retires. The Municipal Court of Chicago is empowered to formulate, adopt and promulgate its own rules of practice. Secco v. Chicago Transit Authority, 6 Ill. App. 2d 266. These cannot be ignored and rendered meaningless. In the instant case, however, defendant did not merely fail to object to the giving of the instructions. He affirmatively approved them. When asked by the trial court if he had any objections to the instructions, counsel for defendant replied, "Okay."

Did the trial judge commit reversible error in twice leaving the bench during the course of the trial, as defendant next contends? Such practice is not to be regarded as fatal error in a civil case unless it shall appear to the reviewing court that the cause of the complaining party was prejudiced by what occurred in court during the judge's absence. Loftus v. Chicago Railways Co., 293 Ill. 475, 482. So far as the record shows, the trial judge absented himself during the cross-examination of plaintiff and again during the examination of plaintiff's physician. Counsel for defendant voluntarily proceeded with his examination of these witnesses and at no time objected before, during or immediately thereafter or before the jury retired. Assuming even, as defendant contends, that the trial judge absented himself during certain portions of the physician's testimony on direct, defendant raised

neither objections to plaintiff's counsel's proceeding with the witness or to counsel's questions asked of the witness. Defendant points to nothing in the record--no unfair advantage taken of him by plaintiff's counsel, no objectionable conduct or word spoken by counsel--that occurred during the trial judge's absence.

In the instant case, the only eyewitnesses to the occurrence resulting in plaintiff's injuries were plaintiff and defendant, and their respective versions were in sharp conflict. Thus, an issue of the credibility of the respective parties was presented to the jury. The jury apparently found plaintiff's version of the occurrence the more probable of the two and believed plaintiff rather than defendant. We cannot say its finding and verdict were against the manifest weight of the evidence or that the absence of the trial judge affected its finding and verdict. The conduct of the trial judge in so absenting himself is not, however, approved. It is derogatory and detracts from the dignity and decorum of the court. It is also to be condemned because of the abuses and misconduct it invites. Wells v. O'Hare, 209 Ill. 627, 636-7; City of West Frankfort v. Marsh Lodge, 315 Ill. 32, 39. That none occurred in the instant case can only be considered fortuitous.

Defendant next contends that the trial judge erroneously directed a verdict for plaintiff on defendant's counterclaim and, further, that defendant was prejudiced in the main case because of the use of certain language

and the "attitude" assumed by the trial judge in directing the verdict for plaintiff on defendant's counterclaim for damages to his car. Defendant introduced no evidence of any monetary damages as a result of the occurrence. The trial judge, in directing the verdict for plaintiff on defendant's counterclaim used the words "right" and "wrong" in attempting to elementalize for the "simple" jurors the motives that might be ascribed to litigants in filing statements of claim and counterclaim in the Municipal Court of Chicago. While those words and the manner in which they were used are not orthodox, the trial judge clearly and unmistakably instructed the jury that disposition of defendant's counterclaim was not and did not affect a determination of plaintiff's claim against defendant. We find no error that would justify reversal.

Defendant contends finally that the verdict awarded plaintiff in the sum of $3,000 was grossly excessive and the result of passion and prejudice. Defendant testified that when he left his own car and went over to plaintiff's car he found plaintiff "unconscious, semi-conscious." Plaintiff "seemed to be nauseated a bit." Plaintiff testified that his head throbbed, that he had a severe headache and a bruise on his head; that he noticed vomit on his jacket; that he "started to vomit, and...couldn't stop." Plaintiff was in the hospital for three days and in bed at home for about five days. Plaintiff's physician confirmed the fact that plaintiff had vomited and, describing further procedure

and results of his examination at the time plaintiff was injured, he and a colleague, a neurologist, diagnosed plaintiff's injuries as abrasions, contusions, bleeding and a concussion of the brain. Plaintiff suffered dizziness and pain in the back of the head. Plaintiff's physician categorized the concussion as moderately severe and in his prognosis stated that he could not determine the degree of recovery. Plaintiff testified that he still suffers headaches, although not so frequently as before, and in hot weather becomes nauseated and dizzy. The damage to his car, his expenses for medical services, hospital room and board, post-hospital medical treatment and loss of wages as a pharmacist's apprentice totaled approximately $276.30. This court cannot say the verdict awarded by the jury was excessive.

Judgment affirmed.

McCormick, P. J., and Schwartz, J., concur.

304A

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7 I.A.2d 296

MADGE O'GALLAGHER, Appellant,	)	APPEAL FROM CIRCUIT
v.	)	COURT, COOK COUNTY.
ALEX FINKEL, Appellee.	)	

MR. JUSTICE ROBSON DELIVERED THE OPINION OF THE COURT.

This is an appeal by plaintiff in a personal injury action from a verdict finding defendant not guilty and from an order of the trial court denying her motion for a new trial.

Plaintiff contends (1) that the verdict is against the manifest weight of the evidence; (2) that the trial court erred in the giving of certain of defendant's instructions; and (3) that the closing argument to the jury of counsel for defendant was improper. A determination of these questions requires that this court first review the evidence in the record of the trial of the case.

The record reveals that the accident that caused plaintiff's injuries took place on May 7, 1952, at approximately 7:30 a.m., at or near the intersection of Montrose avenue and Honore street, Chicago, Illinois. The precise spot is disputed. Transecting Montrose avenue are the elevated tracks of the Chicago Transit Authority, which run north and south, their westmost side roughly parallel to the east side of Honore street which, at that point, is an alleyway. The morning was clear and bright. Plaintiff, a woman 56 years of age, had just got off the south-

bound elevated train on her way to 1131 Grace street to do housework and cleaning. She testified that she came out of the exit door of the elevated station on the north side of Montrose avenue. Directly across the street on its south side, at a point midway between the elevated pillars, was a transfer point or bus stop for eastbound buses operated by the Chicago Transit Authority. A bus stop sign was located on one of the elevated pillars on the southeast corner of Montrose avenue and Honore street. For many years it was customary for passengers making their exit from the elevated station to cross to the opposite transfer point.

One person preceded plaintiff by several feet to the opposite side. Plaintiff, before crossing looked eastward and saw no cars. She then looked westward and saw a car west of Wolcott, which is the street immediately west of Honore street. She could not determine the speed at which it was traveling eastward. She stepped down behind the other passenger and proceeded to cross Montrose avenue at a point midway between the elevated pillars. She was still several feet north of the south curb of Montrose when the passenger who had preceded her reached it. At the same time, plaintiff saw a car to her right almost on top of her, about a foot away. She had heard no horn sounded. The front of the car hit her on the right side and knocked her down in the street.

Plaintiff's version was corroborated to some extent

by police officer John Regan who, together with another police officer, arrived at the scene shortly after the occurrence. Regan testified that defendant, when interrogated at the scene of the occurrence, pointed to a place between the elevated pillars on the south side of Montrose avenue as the place where his car had struck plaintiff. Defendant at that time also told Officer Regan that he had been about fifteen feet from plaintiff when he first observed her, that he had been traveling about twenty-five miles an hour at that point but, when his car struck her, he was traveling only three miles an hour. Regan found no brake or skid marks on the street. When he and the other police officer arrived there, defendant's car was parked at a point southeast of the elevated, its front end slightly facing the south curb. Plaintiff had been removed.

Officer Robert Schoene, who had accompanied Officer Regan to the scene, corroborated the material portions of Officer Regan's testimony. Officer Schoene also testified that he afterward backed defendant's car up into Honore and parked it under the elevated tracks. Officer Schoene testified that when he asked defendant's wife, who had been seated deside defendant at the time of the occurrence, what had happened she replied that "it was so fast that she doesn't remember what happened."

Defendant testified that he had been traveling the same route in the morning for several years, on his way to his place of business, and that he was familiar with the bus

stop in question and with the fact that it was used as a transfer point by passengers leaving the elevated station and traveling eastward. He was traveling about twenty-five miles an hour eastbound when he passed Wolcott street. He was traveling in the north lane of the south half of Montrose avenue, about two or three feet from the center line. He was traveling about ten miles an hour when he saw the plaintiff. She was about fifteen feet west of the elevated tracks, west of Honore street (the alleyway), and somewhat north of the center line of Montrose avenue opposite a barbershop located near the southwest corner of Montrose avenue and Honore street. Plaintiff stopped and turned her head in the direction of defendant's car. Defendant stopped his car about one and one-half feet to the west of plaintiff, and about two feet south of her. He indicated with his hand inside the car that she should proceed. Plaintiff did not move. He waited approximately a minute. Then he started his car forward and plaintiff started forward at the same time. Plaintiff approached a point about three feet south of the center line of Montrose avenue when she was struck by the left corner bumper of defendant's car. The impact pushed her southward and she fell down at a point about midway between the bumper ends and about three or four feet in front of the car. She lay in the street until the police, called by defendant's wife, came. She was bleeding at the back of the head, and was "screaming and hollering." Until the police came, defendant did not move his car. When they

came, plaintiff still lay in the street. They parked his car under the southeast side of the elevated. He denied that he had pointed to a spot under the elevated to the police as the place where his car had struck plaintiff. He denied that he told the police that he had been traveling about twenty-five miles an hour when he first saw plaintiff.

Defendant's wife corroborated her husband's testimony in its material aspects.

It is immediately apparent that the respective versions of the occurrence offered by the parties and their witnesses were in sharp conflict upon virtually every material point in the case. This court cannot say, as plaintiff urges it to find, that the verdict and judgment are against the manifest weight of the evidence. The record discloses that a sharp issue as to the credibility of the parties and witnesses was presented to the jury. However, the case was close on the facts and it was important that nothing occur to upset the delicate balance to prejudice either party. With this in mind we will discuss plaintiff's other contentions.

Proceeding to plaintiff's second contention that the trial court committed reversible error in the giving of certain of defendant's instructions, the trial court gave the jury twelve instructions, eight of these at the request of defendant. None of plaintiff's four instructions was directory. Five of defendant's instructions directed a not guilty verdict. Defendant's instructions No. 8 and

No. 9 read as follows:

> No. 8. "Your verdict in this case must be based upon the evidence. You must not speculate, nor conjecture, nor guess as to the facts in this case. If your finding as to the facts in this case can be made only upon a conjecture or speculation or guess, as to what the facts are, then you must find the defendant not guilty."
>
> No. 9. "The plaintiff is required to prove all the elements of her case by the greater weight of the evidence, and if she has not so proved those elements, or if the evidence is evenly balanced so that you are unable to say on which side is the greater weight of the evidence, or if the greater weight of the evidence is in favor of the defendant, then in any such event the plaintiff cannot recover from the defendant."

Defendant's instruction No. 9 is repetitious. The proposition that plaintiff must recover, if at all, by a preponderance of the evidence is restated twice in defendant's instruction No. 5 and, to some extent, cumulatively, in his instruction No. 6. Defendant's instruction No. 8 unnecessarily adds directory language, although it might otherwise stand as a proper abstract instruction. This court has had recent occasion to state that the request for and the giving of an undue number of repetitious or unnecessary directory instructions in a close case is regarded by the courts with disapproval and, in many instances, as constituting reversible error. Stone v. Warehouse & Terminal Cartage Company, 6 Ill. App. 2d 229, citing cases. This error in the instant case is compounded by the failure of defendant's instruction No. 9 to state and contain within itself all of the material elements or issues of plaintiff's case. This instruction, too, on this ground, has been criticized. Molloy v. Chicago Rapid Transit Co., 335 Ill. 164, 171-2,

citing cases. It can only tend to mislead and confuse the jury. No instruction in the instant case clearly and concisely summarized the material elements or issues of plaintiff's case. See Signa v. Alluri, 351 Ill. App. 11.

Defendant contends that a liberal application of the harmless error doctrine to instructions should prevail in the instant case, and cites Kavanaugh v. Washburn, 320 Ill. App. 250, and McClean v. Chicago G. W. Ry. Co., 3 Ill. App. 2d 235. The liberal rule enunciated in these cases is not in disagreement but in accord with this court's statements in the Stone case, supra. This rule in a case where the evidence strongly preponderated in favor of defendant and where the question as to the propriety of defendant's closing argument was not involved, might well prevail, but that is not the nature of the instant case.

As to plaintiff's last contention that the closing argument of defendant's counsel was improper, the pertinent portions are as follows:

> "He [i.e., Mr. Karlin] will talk about medical expense, pain and suffering and everything else, in an effort to get the jury to forget all about it and go in the jury room and bring out a verdict. And they started this all.
>
> "First, there is Shavin and Hamilton, Mr. Nathan Shavin and Sol Gayle and Leo Karlin; from the Cook County Hospital to the Ravenswood Hospital and then to St. Joseph's Hospital.
>
> "* * *
>
> "I told you at the outset, I was sorry. We hate to see anybody injured, but it doesn't entitle people to come in and run some sort of gauntlet, from one hospital to another and from one thing to another....

"* * * You see, this whole thing started out because Mr. Shavin and Mr. Gayle and Mr. Karlin ---

"Mr. Karlin: Mr. Who?

"Mr. Wildman: Mr. Karlin.

"Mr. Karlin: I object to that. Mr. Karlin wasn't there; Mr. Gayle wasn't there and Mr. Shavin wasn't there. I tried to be polite, but he is not discussing the facts.

"Mr. Wildman: I am going to discuss the facts.

"Mr. Karlin: I wish you would.

"The Court: The jury has heard the testimony. He hasn't completed his statement yet. I have no knowledge of what he is going to say about the individuals mentioned.

"Mr. Wildman: That these lawyers suggested to Mrs. O'Gallagher that this accident happened east of the viaduct...a little underneath the viaduct...."

We find no statements or accusations made by plaintiff's counsel in his opening argument that would incite these remarks. We find no basis for them in the record. Plaintiff, however, in his reply after these statements by defendant's counsel, made remarks that were not proper. This did not justify the initial making of the improper argument by counsel for the defendant. The inferences intended to be drawn from these statements, charges and insinuations by defendant's counsel were no part of the case. Plaintiff's lawyers were not on trial for alleged unethical and unlawful conduct. These were serious charges. Even if not so designed, their effect was such as to inflame and incite prejudice in the minds of the jurors toward plaintiff and her counsel. The remarks were clearly prejudicial.

Rudolph v. City of Chicago, 2 Ill. App. 2d 370; Vujovich v. Chicago Transit Authority, 6 Ill. App. 2d 115; Miller v. Chicago Transit Authority, 3 Ill. App. 2d 223. We are aware of the rule stated in Walsh v. Chicago Railways Co., 303 Ill. 339, as to the latitude to be given attorneys in the argument of a case. The court, however, limited such rights to "reasonable comments." The comments in the instant case were not reasonable. This point is discussed in Vujovich v. Chicago Transit Authority, supra.

When we consider the closeness of the evidence, the erroneous instructions, and add to this the prejudicial closing argument of defendant's counsel, we cannot say that plaintiff had a fair and just trial.

The judgment of the trial court is reversed and the cause remanded for a new trial.

Judgment and order reversed and
cause remanded with directions.

McCormick, P. J., and Schwartz, J., concur.

313 A

46679

7 I.A. 2nd 437

GEORGE W. KONCHAR,

Appellant,

v.

WILLIAM G. KNOX, LUCILLE DAILY KNOX and K & K EXCAVATORS, INC., a corporation,

Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

This is an action to recover damages for alleged conversion by defendants of shares owned by plaintiff in the defendant K & K Excavators, Inc., a corporation.

Plaintiff appeals from an order dismissing the action as to Lucille Daily Knox administratrix of the estate of William G. Knox and entering judgment on her motion to dismiss and abate the action.

The complaint alleges in substance that in accordance with an agreement among the defendants to fraudulently obtain a certificate owned by plaintiff evidencing his ownership of 225 shares in the defendant corporation the defendant William G. Knox stated to the plaintiff that the endorsement and delivery of the stock certificate to Knox was necessary for the "benefit" of the corporation; that defendant William G. Knox before the delivery of said certificate promised plaintiff that he would return the stock certificate to him; that defendants unlawfully converted the shares to their own use; and that defendants canceled plaintiff's stock certificate and in lieu thereof the corporation issued another certificate to the defendants William G. Knox or Lucille D. Knox or their nominees. Plaintiff claims damages in the sum of $60,000.

After issues were joined and pursuant to notice suggesting the death of the defendant William G. Knox, an order was entered giving plaintiff leave to make Lucille Daily Knox, administratrix of the estate of William G. Knox deceased, an additional party defendant, and that summons issue directed to Lucille Knox as administratrix of the estate of William G. Knox, deceased. Lucille Daily Knox, administratrix of the estate of the deceased, filed a general appearance. Several months later Lucille D. Knox, administratrix of the estate of the deceased, filed a petition and motion to dismiss and abate the action.

The petition avers that William G. Knox died intestate in the city of Chicago on November 20, 1953; that Lucille D. Knox was appointed administratrix of his estate on January 13, 1954; that publication for claims was duly made and that the claims date was fixed for March 1, 1954; that no valid claim or suit was filed against the estate of the deceased by plaintiff within the period of nine months as required by statute; that there was no compliance by the plaintiff with Section 192 and Section 204 of the Administration of Estates Act, Chapter 3; and that the cause of action against the defendants has abated under the terms of the statute.

Defendant concedes that a cause of action for conversion of the shares in controversy survives.

Plaintiff's main contention is that the order of June 3, 1954 effectively made Lucille Daily Knox as administratrix a party defendant. Defendant says that the record does not show the proper suggestion of death for the reason

that Section 54 of the Civil Practice Act contemplates filing of some written statement of facts upon which issue may be joined if the facts are disputed. We think defendant's position is untenable because the order of June 3rd recites that Knox died and that Lucille Daily Knox is the administratrix of the deceased's estate. So far as the record shows no objection was made at the time this order was entered. Moreover, the petition to dismiss shows on its face that there are no disputed facts with respect to the death of William G. Knox or the appointment of the administratrix on January 13, 1954. Where, as here, it is conceded that the cause of action survives, the suggestion of death is a matter of form and may be made by either party. (Stoetzell v. Fullerton, 44 Ill. 108.)

Objections are also made by defendant to the process for the reason that the name of the administratrix did not appear on the face of the summons and that it was not directed to her. These objections are without merit. The object of process is to secure the appearance of the parties and process is unnecessary if the party appears voluntarily. (People v. Estep, 6 Ill. 2d 127.)

A general appearance will waive an objection that there was an irregularity or defect with respect to process or notice or that process was void, and it will also waive defects in the service of process or notice or in the return thereof. See Illinois Law and Practice, Vol. 3, Sec. 5, p. 308.

The order of June 3, 1954 which made Lucille Daily Knox administratrix of the estate of William G. Knox, deceased, a party defendant was valid and by filing a general appearance describing herself as administratrix she submitted to the jurisdiction of the court in that capacity. All of the facts out of which the liability arose existed when William G. Knox died. At that time the cause was at issue but the question of liability had not been determined. Under these circumstances the Probate Court was without jurisdiction to entertain plaintiff's claim. (Howard v. Swift, 356 Ill. 80; Morse v. Pacific Ry., 191 Ill. 356.)

Defendant having submitted to the jurisdiction of the Superior Court as administratrix of the estate of William G. Knox, deceased, there was sufficient exhibition of plaintiff's claim. See In re Estate of Collignon, 333 Ill. App. 562. In the view we take of this case it is not necessary to consider the other points raised.

For the reasons given, the order here appealed from is reversed and the cause is remanded for further proceedings.

REVERSED AND REMANDED.

FEINBERG AND KILEY, JJ. CONCUR.

Atty. 324 Abstract

Abstract

General No. 10873 Agenda No. 16

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

October Term, A. D. 1955

7 I.A.2d 438

FRANCES HOFFMAN, Plaintiff-Appellee, vs. CITY OF AURORA, a Municipal Corporation, Defendant-Appellant.	)	Appeal from the Circuit Court of Kane County.

EOVALDI, -- J.

This is an action by plaintiff for recovery of personal injuries sustained by reason of an accident occurring by a fall on an alleged hole in the sidewalk on the easterly bridge crossing the Fox River on Downer Place in the City of Aurora, Illinois, on August 12, 1952. The complaint, in one count, charged the City with negligence and carelessness in improperly suffering and permitting the public sidewalk and street to become and remain in an unsafe and dangerous condition. Upon a trial, the jury returned a verdict of $3,000.00, for which judgment was entered against the City.

Disregarding for the purpose of this opinion, appellant's other alleged errors in the refusal of defendant's instructions, in the giving of plaintiff's instructions, and in the admission of improper evidence for plaintiff, we come to the two points urged by appellant that the record contains no proof that the appellee

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1952

Plaintiff-Appellee,	Appeal from the
vs.	Circuit Court of
CITY OF AURORA, a municipal corporation,	Kane County.
Defendant-Appellant.	

MR. JUSTICE DOVALDT, --- delivered the opinion of the court.

This is an action by plaintiff for recovery of personal injuries sustained by reason of an accident occurring by a fall on an alleged hole in the sidewalk on the westerly bridge crossing the Fox River on Downer Place in the City of Aurora, Illinois, on August 12, 1952. The complaint, in one count, charged the City with negligence and carelessness in improperly suffering and permitting the public sidewalk and street to become and remain in an unsafe and dangerous condition. Upon a trial, the jury returned a verdict of $3,000.00, for which judgment was entered against the City.

Disregarding for the purpose of this opinion, appellant's other alleged errors in the refusal of defendant's instructions, in the giving of plaintiff's instructions, and in the admission of improper evidence for plaintiff, we come to the sole point urged by appellant that the record contains no proof that the appellee

was in the exercise of ordinary care for her own safety, and the record contains no proof that appellant was guilty of negligence.

It appears from the evidence that plaintiff, a woman 65 years old at the time she received her injuries, while walking over the easterly bridge on the north side of the street caught her Cuban heel in a hole on the sidewalk and fell; she described the hole as being about 2 or 3 inches deep. However, in a statement she made shortly after the accident she described the hole as about an inch deep. "I will not say it was more than an inch because I do not wish to exaggerate." It was described as a scabbing or deterioration from frost that occurs in an open area such as a bridge.

At the time of the accident plaintiff was carrying a dozen ears of corn. The day was sunshiny, the sidewalk dry. She had been wearing glasses for 20 years, and was wearing them at the time of the accident. She had passed the spot where the accident took place many times previously. She had resided at 415 Grove Street for 40 years. Prior to 1952 she was employed at the Y. W. C. A. and worked there for four years as an assistant cook. She had not in particular noticed the hole. She testified "The hole was about like a saucer. It was something like you would take a dish and wash out sand. A hollow hole. I went this way from the Y. W. C. A. to my bus each day to and from work."

In a statement made by her after the accident to Mr. Murphy, then city attorney, which was admitted in evidence with no objection, she stated that she had stumbled over this same hole the previous Tuesday and she knew it was there at the time she fell; she was coming along and thought she had about three minutes to make the bus, and so, was not watching the sidewalk; she passed over this spot two times a day and had done so for the past eight years. She got up and went home herself. She skinned both knees and bruised her left shoulder and claimed she had a bruised sciatic nerve in

was in the exercise of ordinary care for her own safety, and the record contains no proof that Appellant was guilty of negligence.

It appears from the evidence that Plaintiff, a woman 65 years old at the time she received her injuries, while walking over the easterly bridge on the north side of the street caught her Cuban heel in a hole on the sidewalk and fell; she described the hole as being about 2 or 3 inches deep. However, in a statement she made shortly after the accident she described the hole as about an inch deep. "I will not say it was more than an inch because I do not wish to exaggerate." It was described as a resulting or deterioration from frost that occurs in an open area such as a bridge.

At the time of the accident Plaintiff was carrying a dozen ears of corn. The day was sunshiny, the sidewalk dry. She had been wearing glasses for 20 years, and was wearing them at the time of the accident. She had passed the spot where the accident took place many times previously. She had resided at 415 Grove Street for 40 years. Prior to 1952 she was employed at the U. S. E. and worked there for four years as an assistant cook. She had not in particular noticed the hole. She testified "The hole was about like a saucer. It was something like you would take a dish and wash out some. A hollow hole. I went this way from the I. W. C. A. to my home each day to and from work."

In a statement made by her after the accident to Mr. Murphy, then only Attorney, which was admitted in evidence with no objection, she stated that she had stumbled over this same hole the previous Tuesday and the time it was there as she time she fell; she was coming along and thought she had about three minutes to make the bus, and so, was not watching the sidewalk; she stepped over this spot ten times a day and had done so for the past eight years. She got up and went home herself. She stained both knees and bruised her left shoulder and claimed she had a marked scratch over the

her left shoulder. She worked the next day.

In the very recent case of Swenson v City of Rockford, No. 10856, wherein the facts are very similar to the facts in the instant case, this court had occasion to analyze the authorities in sidewalk accident cases, and we held as a matter of law that plaintiff was not in the exercise of due care and caution for her safety, and we reversed judgment in her favor. No useful purpose would be served by extending this opinion and we adhere to the opinion in the Swenson case.

Judgment Reversed.

Dove P.J. concurs.

her left shoulder. She moved the next day.

In the very recent case of Swenson v City of Cleburn, No. 10576, wherein the facts are very similar to the facts in the instant case, this court had occasion to analyze the authorities in sidewalk accident cases, and [illegible] was not in the [illegible] as held as a matter of law that plaintiff was not in the exercise of due care and caution for her safety, and we reversed judgment in her favor. No useful purpose would be served by extending this opinion and we adhere to the opinion in the Swenson case.

Judgment Reversed.

329 A

46594

DUSHAN C. DESHICK, Appellant, v. BEST KOSHER SAUSAGE CO., an Illinois Corporation, Appellee.	APPEAL FROM SUPERIOR COURT COOK COUNTY

7 I.A. 2d 439

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

A trial in an action by Dushan C. Deshick against the Best Kosher Sausage Company for damages because of an injury sustained when he allegedly struck his head on an ovefhead door on the defendant's premises resulted in a verdict for $3000. Motions for judgment notwithstanding the verdict and in the alternative for a new trial were sustained and judgment was entered for the defendant. Plaintiff appeals.

The plaintiff, a candymaker, had been doing business with the defendant for about a year. On November 3, 1949, pursuant to an order, he undertook to deliver 9 boxes of candy each weighing about 12 pounds, to the defendant's place of business at 3527-29 West Roosevelt Road, Chicago. He put the candy in his car and drove to defendant's place of business. On arriving he decided to make the delivery through the rear entrance. A plat of a portion of the premises shows that entrance is gained via the rear from an areaway east of the premises through a large sheet metal door which swings outward toward the areaway. Passing through this door one enters a vestibule

from which there is an entranceway to the north into the boilerroom. To the west is a pair of swinging doors which open into a smaller area and then an overhead rolling door which opens into a large room designated as the "butcher room." Proceeding west from the overhead door one comes to a sliding door opening into the sausage room. The plat also shows that there is a bank of windows across the south end of the butcher room, that there are fluorescent lights over the boning tables and certain ceiling lights. In the northwest corner is a wall light 4 feet 6 inches above the floor and to the east of it another suspended light and there is a ceiling light in the vestibule. There is a skylight in the area above the butcher tables. The northerly part of this room is used as a passageway which is separated from the working area by an overhead rod extending in an easterly and westerly direction 8 feet above the floor, on which is hung a curtain that may be drawn to protect the working area from drafts. The ceiling is at least 10 feet high, leaving a space of 2 feet or more between it and the top of the curtain.

Plaintiff testified that he took 3 boxes of the candy from his car, opened the outside door, passed through the vestibule, through the swinging doors and under the overhead door, which he stated he saw and which was all the way up, and into the next room, where he placed his candy next to the scales. He testified that on his way back he came into contact with the overhead door, which cut a gash about an inch and a quarter long in the midportion of his head about three inches from the hairline. He testified

further that when he hit his head he fell to the floor; that he did not see the door before he struck it; that he had been walking at a normal pace; and that he did not become unconscious. He stated that he hit his head on a piece of angle iron at the bottom of the overhead door. Answering a question as to the lighting condition he said: "Was no light." To the question, "Was it light or was it dark?" he answered, "It is pitch dark." To the question, "Did you see this door before you struck it?" he answered, "No." He wastaken to the office of a physician where the wound was sutured and dressed. He then returned and completed the delivery of the candy. Plaintiff was alone when injured and was the only occurrence witness.

He maintains that the court erred in sustaining the motion for judgment notwithstanding the verdict. In determining that question we are required to consider all of the evidence in the record which, in the light most favorable to the plaintiff, together with all favorable inferences which may be drawn therefrom, and with all controverted questions of fact resolved in his favor, tends to prove the essential elements of his case. Geraghty v. Burr Oak Lanes, Inc., 5 Ill. 2d. 153; Vieceli v. Cummings, 322 Ill. App. 559. Defendant asserts that the most that can be said for plaintiff's evidence is that he proved that he was injured; that the proximate cause of his injury is left solely to speculation, and that it is well settled that proof by plaintiff that he was injured raises no presumption

of the exercise of due care on his part or of negligence on the part of defendant. There was competent evidence to support plaintiff's position that defendant was negligent in not adequately lighting the premises, which negligence was the proximate cause of his injury and also to sustain his contention that he was in the exercise of due care for his safety. We conclude that the court erred in allowing defendant's motion for judgment notwithstanding the verdict.

The plaintiff argues that the court erred in sustaining the defendant's alternative motion for a new trial. The granting of a new trial is largely discretionary with the trial court. Plaintiff does not point out wherein the court abused its discretion. The court did not err in granting a new trial. Therefore the judgment of the Superior Court of Cook County is reversed, the order granting the new trial is affirmed, and the cause is remanded with directions to proceed in a manner not inconsistent with this opinion.

JUDGMENT REVERSED, ORDER AFFIRMED
AND CAUSE REMANDED WITH DIRECTIONS

FRIEND, P. J., AND NIEMEYER, J., Concur.

330 A

46648
46649

BENNET BOTSFORD YOUNG,
Petitioner-Appellee,

v.

THE LAKE DEARBORN CORPORATION,
etc., et al.,
Defendants.

KATHERINE W. BRADLEY, et al.,
Petitioners-Appellees,

v.

THE LAKE DEARBORN CORPORATION,
etc., et al.,
Defendants.

On Appeal of
EVELYN PRATT ELLITHORPE,
Defendant-Appellant

7 I.A. 2d 440

APPEAL FROM

CIRCUIT COURT

COOK COUNTY

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT.

Two petitions under the Burnt Record Act were filed in the Circuit Court of Cook County to establish and confirm title to real estate. A decree was entered in each case which established and confirmed title to the real estate in the petitioners. Evelyn Pratt Ellithorpe is the only defendant who took an adversary position. The claim made by her was for a lien and an accounting. The decrees provided that neither the proceedings nor the decrees should affect any lien or liens or claim for a lien or an accounting to which the real estate might be subject. She appealed to the Supreme Court, where the cases were consolidated. The Supreme Court found that the cases were wrongfully appealed to that court and transferred the consolidated

appeal to us. We shall not discuss the constitutional questions urged as points 1, 2 and 5 of her brief.

Appellant says that the decrees are void for want of adequate evidence and for reliance upon judicial notice of events for which no foundation was laid. It was proper to take judicial notice of the Chicago Fire. On the 8th and 9th days of October, 1871, the public records of Cook County, including all of the records in the Office of the Recorder of Deeds and all the records of the courts in Cook County were totally destroyed by that conflagration. The Chicago Fire is a matter of common knowledge. It is a landmark in the history of the city. The courts will take judicial notice of that fire and of its destructiveness.

An examination of the record shows that petitioners followed the procedure outlined in the Burnt Record Act. Appellant's only claim with respect to the real estate described in the petitions is that she had a lien against it. Under the provisions of the statute under which the proceedings were filed the court had no jurisdiction to determine questions with respect to liens. Appellant failed and refused to file any pleading making any other claim to the real estate. She filed no pleading which denied the facts alleged in the petitions. A decree entered in a Burnt Record proceeding to establish and confirm title is binding upon persons properly made defendants.

The chancellor was right in entering the decrees and they are affirmed.

DECREES AFFIRMED.

FRIEND, P. J., and NIEMEYER, J., CONCUR.

331 A

46659

DOLORES ROBERTS ARTERY,

Appellee,

v.

GILBERT ARTERY,

Appellant.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY

MR. PRESIDING JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff filed her complaint for divorce, alleging two separate acts of cruelty. The cause was commenced before the chancellor as a default matter, but after plaintiff had introduced her evidence, defendant decided to interpose a defense. After a full hearing, the chancellor entered a decree of divorce in favor of plaintiff and awarded her $300.00 as attorney's fees.

As one of the grounds for reversal, it is urged by defendant that plaintiff failed to prove extreme and repeated cruelty, as charged in the complaint. The parties were married on October 24, 1953 and separated January 6, 1954; no children were born of the marriage. In addition to the testimony of plaintiff and defendant, three additional witnesses testified on behalf of plaintiff. There is evidence that on December 19, 1953, during a birthday party for defendant given at the couple's apartment, he struck plaintiff in the eye, without cause or provocation, causing her pain and suffering. Following this incident plaintiff's crying attracted the attention of some of the guests, who pushed defendant aside. He told them to leave him alone, and asserted that he had every right to strike his wife

in his own home. Plaintiff's three witnesses were guests at the party, and testified to this act of cruelty. None of them witnessed the incident, but they heard a commotion in the bedroom, saw plaintiff crying immediately thereafter, and noticed red marks on her face.

Plaintiff testified further that on January 6, 1954 defendant struck her on the cheek and scratched her arm, causing her pain and suffering, and that she then left him and lived separate and apart thereafter. She states that she became sick as a result of the second act of cruelty, and did not go to work for several days. Her three witnesses testified that they saw plaintiff on the day of this second incident and observed the condition of her face, which was red and discolored, and also the condition of her arm, which was scratched and bruised. Counsel for the defense cross-examined plaintiff and her corroborating witnesses, and there was redirect examination. Upon the record, we think the chancellor was justified in finding that these two acts of cruelty warranted a decree for divorce.

As further ground for reversal, it is urged that the allowance for attorney's fees was improper. There was no request in the complaint for fees, no proof as to the financial circumstances of the parties indicating that plaintiff was unable to pay fees to her solicitors, and no general prayer for relief; in her complaint plaintiff prayed only that she be granted a divorce and permitted to resume her maiden name.

Plaintiff takes the position that because defendant's lawyer decided at the last minute to interpose a defense, thereby necessitating a full hearing, the award of attorney's fees was proper, but her counsel cite no cases which would justify such an award where the complaint is silent on that specific issue and contains no prayer for the allowance of fees or for general equitable relief. We feel that, under the circumstances, the award of attorney's fees to plaintiff was improper.

Accordingly, that portion of the decree granting a divorce to plaintiff is affirmed, while that portion awarding attorney's fees to plaintiff is reversed.

DECREE AFFIRMED IN PART AND REVERSED IN PART.

BURKE AND NIEMEYER, JJ., CONCUR.

332 A

46591

7 I.A.2d 441

IDA M. MAZUR and SARAH M. COHEN, Appellees, v. CHICAGO TRANSIT AUTHORITY, a Municipal Corporation, Appellant.	APPEAL FROM CIRCUIT COURT COOK COUNTY.

MR. JUSTICE NIEMEYER DELIVERED THE OPINION OF THE COURT.

Defendant appeals from separate judgments in favor of plaintiffs in their action for damages for personal injuries alleged to have been sustained in a collision between two elevated trains of defendant. Plaintiffs were passengers in the last car of a standing train, run into by the train following. The only issue in the case was the extent of the injuries sustained by the respective plaintiffs as a result of the collision. The jury returned verdicts awarding Mrs. Mazur $14,000 and Mrs. Cohen $22,000. Judgments for these amounts were entered.

Defendant offered no evidence. It contends that the damages awarded were excessive, that improper and prejudicial evidence was received on behalf of plaintiffs and that plaintiffs' counsel was guilty of improper conduct tending to prejudice the jury against defendant.

Where the issues are restricted to the single question of damages, evidence of the occurrence is competent and material only so far as it is relevant and material to the damages claimed. Olson v. Chicago Transit Authority, 346 Ill. App. 47, 62.

Plaintiff Mazur testified fully as to the facts of the collision, including the violence of the impact and events affecting herself and plaintiff Cohen occurring immediately thereafter. Six witnesses who were passengers on the train, apparently in other cars, testified to facts of the occurrence in no way connected with plaintiffs. Four photographs showing the condition of the cars in the train after the collision were received in evidence. Only one of the photographs showed the condition and position of the car in which plaintiffs were riding. The other photographs were of other cars and other passengers with pained and frightened expressions, and of policemen and firemen called to the scene. These photographs are in the same category with the photographs referred to in the opinion in Vujovich v. Chicago Transit Authority, 6 Ill. App. 2d 115, decided by the Third Division of this court while the instant case was pending on appeal. The judgment in that case was reversed because of the improper admission of certain of the photographs, the admission of testimony of other passengers similar to the testimony of the witnesses Cullinan and Milgram in this case, and the conduct of counsel. Defendant asserts in the reply brief that one of the photographs in the Vujovich case is identical with one of the exhibits before us. This statement, based on an erroneous conception of the rule of judicial notice, must be disregarded. Neither the trial courts nor the reviewing courts take judicial notice of the records or

evidence in other cases in the court. 20 Am. Jur., Evidence, sec. 87. We do take notice of the published opinions of the reviewing courts. In the instant case only the photograph showing the condition and position of the car in which plaintiffs were riding was material and competent. Because of the error in admitting the remaining three photographs and the testimony of the six occurrence witnesses other than plaintiffs, the case must be reversed for a new trial.

We will not consider or even mention all of the many errors complained of by defendant. In many cases the error is so obvious we do not believe that it will be repeated on a new trial. Thus plaintiff was permitted to prove that Mrs. Cohen, who was visiting her niece Mrs. Mazur when the accident happened, obtained a travel policy on her life when returning to her home in St. Louis after the accident. When an objection was made to a question put to Mrs. Cohen, her counsel said: "I don't care, Judge; it isn't so important. I just wanted to show her financial status; that's all." Surely the experienced counsel knew that plaintiff's financial status had no bearing on the injuries sustained by her.

Speculative evidence as to the nature and extent of the injuries of plaintiffs was admitted over objection. The claim was made that Mrs. Cohen suffered from a skull fracture. The attending physician did not have the benefit of X-rays. A medical expert who examined Mrs. Cohen shortly before the trial was permitted to testify

over objection that certain lines on X-rays taken for him might be designated by some as a line of skull fracture, but that he would not so designate them. This testimony was followed by questions based on the assumption that the lines on the X-rays indicated a skull fracture. Proof of the skull fracture from the X-rays was purely speculative. Neither the X-rays nor the testimony should have been admitted. As the case must be tried again, we do not discuss the alleged excessiveness of the verdicts or the extent of the injuries sustained by plaintiffs.

The judgments are reversed and the cause remanded for a new trial.

REVERSED AND REMANDED.

FRIEND, P. J., AND BURKE, J., CONCUR.

281 A

46510

THE CRAFTSMEN FINANCE COMPANY, a corporation, Appellant, v. LANDFIELD FINANCE COMPANY, a corporation, Appellee.	APPEAL FROM THE MUNICIPAL COURT OF CHICAGO.

71 I.A. 2d 541

MR. PRESIDING JUSTICE LEWE DELIVERED THE OPINION OF THE COURT.

Plaintiff appeals from a judgment entered on a finding of the court in favor of the defendant in an action to recover plaintiff's proportionate share of money advanced and the profits resulting from an alleged loan made by the parties to one Cooksey. Plaintiff's motions for a new trial and in arrest of judgment were overruled.

Plaintiff, an Ohio corporation, maintained offices in Cleveland and Chicago. Oscar Steiner had charge of the Cleveland office and Joseph Wertheimer had charge of the Chicago office. March 28, 1950, Joseph M. Cooksey, doing business as Shoreline Press, executed a note for $86,250 secured by chattel mortgage payable to defendant. Defendant, who had possession of the note and chattel mortgage, collected the payments and accrued interest as they matured. October 1, 1950, Cooksey paid the note in full to defendant.

According to the statement of claim plaintiff and defendant entered into a parol agreement in February 1950 to advance two-thirds and one-third respectively of the sum lent to Cooksey and defendant has failed to account to plaintiff for its portion due under the parol agreement, amounting to $11,363.35 and interest.

In its answer defendant averred that it entered into an agreement with Steiner and Wertheimer to make the Cooksey loan; that there remains unpaid and due to Steiner the sum of $11,114.17 but that defendant has a counterclaim against Steiner in an amount in excess of the distributive share due him. It is admitted that defendant has accounted to Wertheimer for his full distributive share of the proceeds of the Cooksey loan.

Defendant's theory is that Wertheimer in entering into the agreement to make the Cooksey loan did not act as plaintiff corporation's agent but acted for himself and Steiner who was the principal in this transaction.

The basic issue presented is whether the distributive share of the proceeds of the Cooksey loan held by defendant is due to the plaintiff corporation or to Steiner.

There is evidence that during the period from January 1, to June 30, 1950, Theresa Wertheimer, wife of Joseph Wertheimer, held 130 shares of the plaintiff corporation; Steiner, Wertheimer, and Louis Kohn each owned one share. The Cleveland Trust Company, as cotrustee with the Steiners, held 134 shares. The beneficiaries of this trust were the three Steiner children. The treasurer of the plaintiff corporation, Louis Kohn, was also treasurer of Turner Printing Machinery, Inc. In the latter capacity Kohn was employed by Joseph Wertheimer. The shares of Turner Printing Machinery, Inc. were held by substantially the same persons and in the same number as those of the plaintiff corporation. Kohn had his private office on the premises of the Turner company and the ledger sheets of both companies "run together." The transactions

of the plaintiff corporation were indicated on the books of Turner Printing Machinery, Inc. by two stars. There was no "real distinction" between Turner and the plaintiff corporation.

M. S. Landfield, president of the defendant company, was acquainted with Steiner and Wertheimer many years before the transaction with Cooksey took place. Over a period of years Steiner and Wertheimer either individually or their respective family groups, M. S. Landfield, and the defendant company participated in about 50 or 60 business transactions. Twelve of these transactions in which Landfield, Wertheimer and Steiner took part appear in the record. They relate to the purchase of real estate and printing companies, the exploitation of a patent and a loan to a printing company. In six of these transactions Steiner had a one-third interest and in four he had a one-fourth interest. In none of these transactions was either plaintiff or defendant involved, and in some instances the corporate entity was used as a contracting party. However, Steiner, Wertheimer and Landfield were the real parties in interest in every transaction.

With respect to the Cooksey loan Steiner had no conversation or negotiations prior to the making of that loan with any of the officers or employees of the defendant company. Some time prior to the confirmation of the loan to Cooksey, Steiner had a conversation about it with Wertheimer. Kohn testified that the Cooksey loan was set up on the books of the plaintiff corporation, "on the agreement and recommendation or orders or directions of Mr. Wertheimer in all probability. A lot of it was done over the telephone and a lot of it was done through correspondence." March 28, 1950, Wertheimer

instructed the accountant of the defendant, one Kenost, to set up the Cooksey transaction, "one-third to Landfield, one-third to Steiner, and one-third to Wertheimer." "This deal is going to be split three ways." Defendant's ledger sheet, which was received in evidence, shows the equal division between Steiner, Wertheimer, and the defendant, including the date and amount of payments made by Cooksey and the balance remaining from time to time. It also shows the final credit balance of zero. As the defendant received payments on the Cooksey account checks for the proportionate shares of Steiner and Wertheimer were made out and sent to each of them individually by the defendant.

July 19, 1950 a letter signed by Louis Kohn, assistant treasurer of Turner Printing Machinery, Inc., on the letterhead of that company, addressed to Kenost, as auditor of the defendant company, reads: "Last month I requested that you mail the Cooksey check to Craftsmen Finance Company which was originally intended to go to Mr. Steiner's account. For some reason you have not done so. If your bookkeeping or record keeping is such that you cannot do it, please arrange to send both Mr. Wertheimer's check and Mr. Steiner's check directly to me. I would prefer, however, to have checks made out in the name of Craftsmen Finance Company. If this cannot be done, arrange to send both checks on to me, personally."

October 1, 1950 Cooksey repaid the loan to defendant with interest. At that time defendant claimed a balance due from Steiner individually amounting to $2,746.37, after

allowing Steiner $11,114.17 as his proportionate share of the profit on the Cooksey transaction. Plaintiff admits that from its inception all of the negotiations relative to the Cooksey loan were carried on by Wertheimer and Landfield without any participation on the part of Steiner.

Plaintiff contends that the judgment is founded on incompetent testimony. Landfield testified, over plaintiff's objection, that about March 28, 1950 Wertheimer told Kenost, Landfield's auditor, "to set up the books" with reference to the Cooksey transaction "as an individual deal for Landfield, Steiner, and Wertheimer, one-third each." Kenost was likewise permitted to testify concerning the same conversation. Plaintiff argues that this testimony was objectionable because it appears that Wertheimer was not acting for plaintiff at the time the alleged statements were made, nor was he acting within the scope of his authority. In Price Co. v. Ruggles & Rademaker Salt Co., 283 Ill. App. 447, the defendant contended that it entered into a contract directly with a third party, whereas plaintiff claimed that it had negotiated the contract as agent for the defendant. There the defendant-principal sought to introduce evidence of its own negotiations with a third party outside the presence of its purported agent, and the alleged agent offered evidence of conversations with the third party outside the presence of the defendant principal. The court concluded that both types of evidence were admissible. Under the authority last cited we think the evidence of Landfield and Kenost was competent.

Plaintiff also insists that the trial court erred in permitting Landfield to testify to a series of business ventures in which he, Wertheimer, and Steiner were personally involved, on the ground that evidence of transactions other than the one involved is inadmissible. Under similar circumstances this precise question was determined adversely to plaintiff's contention. In Price Co. v. Ruggles & Rademaker Salt Co., 283 Ill. App. 447, where the defendant sought to show that under prior dealings between the parties of a similar character to the transactions there involved defendant had paid plaintiff commissions as it had done under the two contracts in question. The court held that this evidence was erroneously excluded. In Firlotte v. Jessee, 172 Pac. 2d 710, the court said at page 712, quoting Wigmore on Evidence: "While ordinarily evidence that a certain contract was made with A. is not admissible to show that a similar contract was made with B. it has repeatedly been held that such evidence may, in the discretion of the court, be allowed where the circumstances indicate a strong probability that the course followed in one instance would be followed in others."

And in Sample v. Romine, 8 So. 2d 257, a suit to establish a one-third interest in oil leases and minerals, on the theory that, although title to the leases was taken in the name of the defendant and a deceased, evidence regarding similar transactions between the plaintiff and the deceased and the plaintiff and defendant ranging over a long period was competent for the purpose of showing a general

plan used by the parties in procuring and handling oil and gas leases. To the same effect see Maloney Tank Mfg. Co. v. Mid-Continent Petroleum Corp., 49 F. 2d 146 and Page v. Hancock, 200 S. W. 2d 421.

The record shows that plaintiff introduced its "notes receivable account" relating to the Cooksey transaction, as plaintiff's Exhibit A. This exhibit shows that on September 29, 1950 after the Cooksey loan was paid and a distribution made to Wertheimer there was still due Craftsmen from defendant the sum of $11,622.45. Exhibit A shows certain entries made after September 29, 1950. On cross-examination by the defendant, Kohn testified that these entries were made by his assistant at his direction; that he, Kohn, received his instructions from one Black, a certified accountant employed by plaintiff; and that Black acted on information supplied by Steiner. Steiner testified that the entries were made at his direction to Black and that he, Steiner, knew what the entries were. Defendant's counsel objected to Steiner's testimony on the ground that Steiner was attempting to testify to the meanings of the entries of the books of the plaintiff without their production in court. When the trial court sustained defendant's objection, plaintiff made an offer of proof which was substantially as follows. After Steiner purchased the interest of Wertheimer in the plaintiff corporation in August 1952 the question of the claim of the plaintiff corporation against the defendant arose. At one time a settlement had been arrived at between Landfield and Steiner. Steiner had offered to settle all of the obligations

that were being asserted against him by Landfield, and Steiner was settling all of the counterclaims he was asserting against the "Landfield Group." They arrived at a figure of approximately $4500 which Steiner offered to Landfield as a final settlement and waiver of any claims he was asserting and Landfield would waive all claims he was asserting against Steiner, so that "there would be a complete washout of their differences."

Wertheimer suggested to Steiner that he place $6,000 in escrow with a firm of auditors who would audit the accounts. In the event the figures of the auditors disclosed more than $4,500 due from Landfield, Steiner would pay the difference and if it was less than $4,500 Wertheimer would pay it.

The purpose of the offer was to explain entries of $6,000 and $5,622.45 appearing in plaintiff's Exhibit A. We think the proffered testimony was inadmissible, for the reason that plaintiff's books of original entry were not produced. In Inter-State, etc. Corp. v. Jewelry Co., 280 Ill. 116, at page 119, the court said: "The material contents of an existing book of original entry which is obtainable cannot be proven by parol testimony, as the book itself is the best evidence. Account books, if in existence, are the best evidence of their contents, and a witness may not state the condition of such accounts from memory while such books are accessible."

The record shows that after both sides rested plaintiff requested that the trial court continue the case to give plaintiff an opportunity to call Wertheimer for rebuttal purposes. Plaintiff argues that the refusal to grant a continuance to rebut the testimony of Landfield and Kenost constitutes an abuse of discretion.

The record shows that Wertheimer was present during the time the trial was in progress. Neither party attempted to call him as a witness. The law seems well settled that the question whether or not a judge should reopen a case after it has been once closed is a matter within the discretion of the court. See Schleicher v. General Accident, Fire and Life Ins. Co., 240 Ill. App. 247. Under the circumstances shown in this record we do not think that the trial court abused its discretion.

Finally, plaintiff maintains there is no competent evidence to support the judgment. The evidence shows that the Cooksey transaction was contracted by Wertheimer. Before its completion Steiner had conversed with Wertheimer in regard to the loan. Kohn, who was in charge of plaintiff's books and records, did not know whether he actually had anything to do with the Cooksey transaction. All of the information regarding the transaction had been received from Chicago and Kohn assumed it came from Wertheimer. A letter dated June 13, 1954, defendant's Exhibit 19, from plaintiff, signed by Kohn, addressed to one Glasser, states: "I have written to Mr. Robert Kenost that on the Cooksey deal the one-third on collections due Mr. Joseph Wertheimer and

one-third of the collections due Mr. Oscar Steiner should be mailed directly to Cleveland payable to the Craftsmen Finance Company . . . ." It seems to us that the foregoing letter, which admits that one-third each, was due to Wertheimer and Steiner; the issuance of checks by defendant in the Cooksey transaction payable to Steiner and Wertheimer individually; lack of knowledge of the Cooksey transaction on the part of Kohn, treasurer of the plaintiff; and the exhibits, all strongly tend to prove that the plaintiff corporation was merely used as an instrumentality for the performance of the transaction here in controversy, and that Steiner, Wertheimer, and Landfield were the real parties in interest.

In our view the cause was fairly tried and the evidence is ample to support the judgment.

For the reasons given, the judgment is affirmed.

JUDGMENT AFFIRMED.

KILEY AND FEINBERG, JJ. CONCUR.

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STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

October Term, A. D. 1955

Term No. 5508 Agenda No. 2

THE PEOPLE OF THE STATE OF ILLINOIS,	)	
Plaintiff-Appellee,	)	On appeal from the Circuit Court of Jasper County, Illinois.
vs.	)	
TILDEN DECK,	)	
Defendant-Appellant.	)	

CULBERTSON, J.

Defendant-Appellant, TILDEN DECK (hereinafter called defendant), prosecutes an appeal to this Court under Section 798 of Chapter 38, 1953 ILLINOIS REVISED STATUTES, seeking reversal of an order of the Circuit Court of Jasper County by which his probation was revoked and said defendant sentenced to the penitentiary for a term of not less than two years or more than five years.

The record in this case discloses that the defendant plead guilty to an indictment charging him with larceny and applied for and received probation

at the October, 1951 Term of the Circuit Court of Jasper County, and that the period of said probation was fixed at three years. Less than three months before the termination of said period of probation a petition was filed charging the violation of said probation by the defendant herein, and the following violations were charged: (1) that he had been convicted of reckless driving within the probation period; (2) that in May, 1954 defendant had made an assault with a deadly weapon upon another person, in Cumberland County, Illinois, by shooting at that person with a revolver, twice hitting the automobile in which the latter was then riding, and that thereafter, he unlawfully pushed the automobile into a creek; (3) that in June, 1954, in Cumberland County, Illinois, defendant had issued a fraudulent check; and (4) that on or about July 17, 1954 defendant had assaulted his wife by slapping her in or about a church in the presence of the congregation.

When the matter of this defendant's revocation of probation came on before the Court for a hearing, the defendant being present with Counsel, the evidence discloses that uncontroverted evidence was introduced to prove the charge that defendant had been found guilty of reckless driving and fined $50.00

in the County Court of Cumberland County, while on probation; and also, that the defendant, during the period of his probation, on an evening in the summer of 1954, at about 10:00 or 11:00 p.m., when defendant's wife came home in a car with one Jim Wade, that the defendant shouted to Wade to stop and that when Wade failed to do so, defendant fired four shots at the car with a 22-caliber pistol. Some of the shots hit the car which Wade was driving. The defendant got in his car and pursued Wade and succeeded in blocking the way when the two cars met, and after some scuffling, Wade got out of his car and ran away, and defendant then proceeded to push Wade's car into a shallow ditch at the side of the road and drove away. There was evidence offered concerning the giving by defendant of a $5.00 check while he was on probation and which was returned marked "insufficient funds." A warrant was issued for defendant in connection with the giving of this check and the matter was subsequently settled. There was also introduced some evidence concerning an altercation between defendant and his wife, but this evidence seems, from an analysis of it, to be of little consequence. In this state of the record the Trial Court was called upon to give consideration to whether or not that quantum of evidence had been presented to warrant the revocation of this defendant's probation.

Revocation of probation, when granted, is within the discretion of the Trial Court, and the Appellate Court is warranted in disturbing judgment thereon only when it appears the Trial Court acted arbitrarily or abused his discretion (1953 ILLINOIS REVISED STATUTES, Chapter 38, Section 789; PEOPLE vs. ADAMS, 406 Ill., 232; PEOPLE vs. BEARD, 349 Ill. App. 465).

It is suggested on this appeal that as the period of probation was so soon to expire that it should not have been revoked. We are not disposed to adopt this reasoning as the matter of the observance of the terms of defendant's probation should have been a matter of concern to defendant himself and he should have obeyed the terms of his probation if he desired its provisions to be available to him at all times.

A careful consideration of the evidence presented in connection with this matter persuades us and we so hold that the Trial Judge was fully warranted, under the evidence, to revoke the defendant's probation, and in so doing he did not act arbitrarily in any way, nor did he abuse his discretion.

For the reasons herein set forth the judgment of the Circuit Court of Jasper County is hereby affirmed.

Affirmed.

Bardens, P. J. and Scheineman, J. concur.

Publish Abstract only.

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General No. 10875 Agenda No. 17

IN THE

APPELLATE COURT OF ILLINOIS

--- 7 I.A. 2d 543

SECOND DISTRICT

October Term, A.D. 1955

KLEMP METAL GRATING CORPORATION, Plaintiff-Appellee, vs. EDWIN PRATT'S SONS, CO., a Corporation, Defendant-Appellant.	Appeal from the Circuit Court of Kankakee County.

DOVE, P. J.

Blauner Construction Company of Chicago was a general contractor in connection with the construction of a new cell block at Sheridan Reformatory. Edwin Pratt's Sons Company was a subcontractor for certain steel and metal work including gratings. In reply to a letter of April 17, 1952, written by defendant to the plaintiff, Klemp Metal Grating Company, asking a quotation on certain passage iron gratings required by it under its subcontract, the plaintiff, on April 18th, wrote the defendant:

"Gentlemen:

Subject: Unit C-8, Inmate Housing
Illinois State Reformatory
Senate Bill No. 771
State File No. 37 1/2
Our Quotation No. 52-3113

General No. 10815 Agenda No. 17

IN THE

APPELLATE COURT OF ILLINOIS

71 A. 543

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October Term, A.D. 1952

KLEMP METAL GRATING CORPORATION, Plaintiff-Appellee, va. MELVIN PRATT'S SONS, CO., a Corporation, Defendant-Appellant.	Appeal from the Circuit Court of Kankakee County.

DOVE, P. J.

Klemp Construction Company of Chicago was a general contractor in connection with the construction of a new cell block at Kankakee Reformatory. Melvin Pratt's Sons Company was a subcontractor for certain steel and metal work including gratings. In reply to a letter of April 17, 1952, written by defendant to the plaintiff, Klemp Metal Grating Company, asking a quotation on certain passage iron gratings required by it under its subcontract, the plaintiff, on April 18th, wrote the defendant:

"Gentlemen:

Subject: Unit C-8, Kankakee Housing
Illinois State Reformatory
Bond No. 771
State File No. 37 1/2
Our Quotation No. 52-3113

Thank you for the opportunity to submit our bid on the open steel flooring for the above mentioned job. We quote the following.

525 sq. ft. Klemp Type KWA 3 welded grating with 1 1/4" x 3/16" bearing bars spaced 1 3/16" center to center and 1" clear opening and 5/16" cross-bars power forged into bearing bars on 4" centers at $1.90 per sq. ft. Making a total price of $997.50 painted one shop coat standard black. Shipment 6 to 8 weeks after receipt of order or our approved drawings. Terms 1% 10 days, net, if credit approved, F.O.B. Chicago with full freight allowed to Sheridan, Illinois. Prices include standard fasteners and erection drawings by our Engineering Department, if necessary. Weight 5,072 pounds."

After some negotiation between the parties hereto, the plaintiff, on August 11, 1952, wrote the defendant:

"Gentlemen:

Subject: Our quotation No. 52-3113.

Please revise the sq. ft. price on this quotation from $1.90 per sq. ft. to $1.50 per sq. ft. This also would make the total price $787.50 instead of $997.50, otherwise our quotation remains as quoted."

On August 21, 1952, defendant mailed, and on August 22, 1952, plaintiff received, a purchase order numbered 11465 executed by defendant, directed to the plaintiff, in which under the column designated "specifications" was typed:

under the column designated "Specifications" was typed:

ensued by defendant, directed to the plaintiff, in which
22, 1952, plaintiff received, a purchase order numbered 11165
on August 21, 1952, defendant mailed, and on August

"Please review our quotation remains as quoted."

Please revise the sq. ft. price on this quotation
from $1.90 per sq. ft. to $1.50 per sq. ft. This will
result make the total price $167.50 instead of $277.50.

Subject: Our quotation No. D2-3113.

Gentlemen:

After some negotiation between the parties hereto, the plaintiff, on August 11, 1952, wrote the defendant:

decrease. Weight 5.01% points."

drawings by our Engineering Department, if necessary. Weight 5.01% points."

Prices include standard fasteners and erection

with full freight allowed to Sheridan, Illinois.

days, net, if credit approved, F.O.B. Chicago

order or two approved drawings. Terms 1% 10

plant. Shipment 6 to 8 weeks after receipt of

price of $75.50 painted one shop coat standard

$ cwt., delivered at $1.10 per sq. ft. Having a total

cross-bars power formed true bearing bars on

center to center and 1" clear opening and 5/16"

wide x 1/2" x 3/16" bearing bars spaced 1 3/16"

525 sq. ft. Kleen Type 143 3 welded grating

bid on the open steel flooring for the above

mentioned job. We quote the following.

Thank you for the opportunity to submit our

"All necessary grating as required for Inmate Housing C-8, Illinois State Reformatory, Sheridan, Illinois, as per quotation 52-3113, dated August 11, 1952. All work subject to the approval of the architects. Ship, prepaid to: Blauner Construction Co., Gen. Contractors, c/o Illinois State Reformatory, Sheridan, Illinois, Bill us."

On September 3, 1952, the plaintiff executed a written acknowledgment of this order referring to it as Customer's Order 11465, dated 8/21/52, showing the sale to the defendant, shipment to be made by truck to Blauner Construction Company, and describing the subject of the contract as "all necessary grating as required for Inmate Houston (Housing) C-8, Illinois State Reformatory, Sheridan, Illinois as per quotation #52,3113 dated August 11, 1952. All work subject to approval of the architects. Note. In regard to the above order we note you have not attached the necessary drawings for fabrication of gratings. Since our quantities were received by a takeoff at another office it will be necessary for you to furnish us with the drawings required for detailing or whatever is necessary to fabricate properly."

On November 4, 1952, the plaintiff wrote defendant calling attention to and quoting from what appeared (after the word "note") upon the acknowledgment of September 3, 1952, and said: "We are still waiting to hear from you regarding this note. We should appreciate hearing from you immediately because we must hold up this order until we have the definite information with which to fabricate this order." Two days later defendant replied as follows: "Enclosed with this letter is a print

of the grating required for our Order No. 11465 as per your request. We are sorry that we omitted to send a second set of prints to you which held up this order. When these gratings are completed ship them directly to the job site."

After receiving the prints or shop drawings enclosed in defendant's letter to the plaintiff of November 6, 1952, the plaintiff fabricated 84 pieces of grating which were to be used for passageways between cells and shipped as directed. The architect rejected the grating so manufactured and delivered, and on October 8, 1953, the instant complaint was filed to recover the contract price for 485 square feet of grating at $1.50 per square feet or a total of $727.50. The answer of the defendant denied that the contract was made as alleged and averred that the grating was not constructed according to the contract or with the shop drawings and was rejected by the architect. Plaintiff replied denying that the grating was not constructed according to the contract or shop drawings and denying that the gratings were rejected by the architect but avers that if they were rejected it was because defendant erred in submitting to the plaintiff incorrect shop drawings. To this reply defendant filed a responsive pleading denying that the architect's rejection was the result of any error of the defendant in submitting to the plaintiff incorrect shop drawings. The issues thus made were submitted to a jury resulting in a verdict and judgment in favor of the plaintiff for $727.50, and defendant appeals.

The record discloses that the iron gratings, which are the subject of this contract, were to be used in a passageway between cells at the Illinois State Reformatory at Sheridan,

of the grating required for our Order No. 11545 as per your request. We are sorry that we omitted to send a second set of prints to you which help us this order. When these gratings are completed ship them directly to the job site."

After receiving the prints or shop drawings enclosed in defendant's letter to the plaintiff of November 6, 1952, the plaintiff fabricated 9 pieces of grating which were to be used for passageways between cells and shipped as directed. The architect rejected the grating so manufactured and delivered, and on October 8, 1953, the instant complaint was filed to recover the contract price for 1657 square feet of grating at 1.50 per square foot or a total of $2727.50. The answer of the defendant denied that the contract was made as alleged and averred that the grating was not constructed according to the contract or with the shop drawings and was rejected by the architect. Plaintiff replied denying that the grating was not constructed according to the contract or shop drawings and averred that the gratings were rejected by the architect but avers that if they were rejected it was because defendant erred in submitting to the plaintiff incorrect shop drawings. To this reply defendant filed a responsive pleading denying that the architect's rejection was the result of any error of the defendant in submitting to the plaintiff incorrect shop drawings. The issues thus made were submitted to a jury resulting in a verdict and judgment in favor of the plaintiff for $2727.50, and defendant appeals.

The record discloses that the iron gratings, which are the subject of this contract, were to be used in a passageway between cells at the Illinois State Penitentiary at Sheridan,

the passageway being four feet wide, one foot on each side of the two-foot wide iron gratings. Each grating was to rest on supporting beams, as shown on the shop drawing, and consisted of load carrying bars into which, by machine, are forged cross-bars, the function of which is to retain the carrying bars in position.

The print or shop drawing sent plaintiff by defendant in its letter of November 6, 1952, was properly identified and offered and admitted in evidence. On behalf of the plaintiff, Francis Paluck testified that he was the chief draftsman for the plaintiff and that it was his business to process orders which came to the plaintiff and that he did so in this case; that the gratings involved in this proceeding were of good quality, properly fabricated according to the specifications submitted by defendant, and that the bearing bars were fabricated in two-foot lengths making a total of 84 pieces which was standard procedure, and that the symbols appearing on the specifications and plan submitted by defendant to plaintiff did not refer to the number of pieces but to areas.

Louis Blauner, called by the plaintiff, testified that he was president of the general contractor, Blauner Construction Company; that defendant had access to the architect's plans and specifications, and that defendant prepared the drawing showing details which was approved by the architect and submitted by defendant to plaintiff in connection with the contract involved in this proceeding. This witness further testified that gratings made according to the drawing would not be acceptable

that gratings made according to the drawing would not be acceptable
to the Patent Office. Plaintiff in connection with the contract involved in this proceeding, Thin witness further testified
that the drawing submitted by defendant to plaintiff in connection with the
application for the patent in suit, Blamer Corporation, Blamer Company; that defendant had access to the architect's
plans and specifications; and that defendant prepared the drawings for grating design which was approved by the architect and
accepted by defendant to plaintiff in connection with the contract involved in this proceeding. Thin witness further, testified
that gratings made according to the drawing would not be acceptable
in the trade. Each grating was to rest on
the two-foot wide iron gratings. Each grating was to rest on
supporting beams, as shown on the shop drawing, and consisted
of load carrying bars into which, by machine, are forced
cross-bars, the function of which is to retain the carrying
bars in position.

The suit or suit drawing sent plaintiff by defendant
in its letter of November 6, 1952, was properly identified and
offered and admitted in evidence. On behalf of the plaintiff,
Francis Palmer testified that he was the chief draftsman for the
plaintiff and that it was his business to process orders which
came to the plaintiff and that he did so in this case; that the
gratings involved in this proceeding were of good quality,
properly fabricated according to the specifications submitted
by defendant, and that the bearing bars were fabricated in
two-foot lengths making a total of 8% pieces which was standard
procedure, and that the symbols appearing on the specifications
and plan submitted by defendant to plaintiff did not refer to
~~xxxxxxx~~ the number of pieces but to areas.

Louis Blamer, called by the plaintiff, testified
that he was president of the general contractor, Blamer Con-
struction Company; that defendant had access to the architect's
plans and specifications; and that defendant prepared the draw-
ings during detailed which approved by the architect and

as the carrier bars should run the opposite way; that after the delivery by plaintiff of the gratings and their rejection by defendant, his company, as the general contractor, ordered other gratings from the plaintiff directing it to reverse the direction of the bars and allow a little more clearance. This witness further testified that in steel fabrication, including metal gratings, minor tolerances up to 3/4 inch are permissible.

On behalf of the defendant, D. E. Pratt testified that he was secretary of the defendant company; that the drawing submitted by defendant to the plaintiff was approved by the contractor and the architect; that certain symbols appearing thereon indicated the number of pieces of grating required, that the total was 43 and plaintiff shipped 84 and of this number 57 varied in measurements from 1/4 to 1/2 inch, and that he knew of no custom that the number of pieces was not important.

It is conceded that through an error in the architect's detailed drawing, perpetuated in the approved shop drawings, the carrying bars in each grating were shown as running parallel to instead of at right angles to the supporting beams. In other words, the architect had the sketch detailed wrong. His plans showed the load carrying bars running parallel to the supports, while they should have run in the reverse direction from that indicated.

Counsel for appellant state that appellee having undertaken to fulfill a particular portion of a building contract, its responsibility was to do so; that the shop drawings were no part of the contract, and plaintiff could have used any drawings it desired or none at all; that if it did use the architect's drawings it was guilty of gross negligence in not discovering the

the error therein; that defendant made no representation that the architect's detailed drawing of the grating was correct or assumed responsibility for its correctness; that defendant had no notice of the architect's error, and, even if it had, it was under no obligation to call plaintiff's attention to the error; that the work was subject to the approval of the architect; that the architect disapproved because the gratings were unusable and his disapproval was therefore not unreasonable.

Under the facts disclosed by this record, this argument is not persuasive. The purchase order executed by defendant on August 21, 1952, accepted the offer of August 11, 1952, and noted that the work was subject to the approval of the architect. Receipt of this order was acknowledged by plaintiff on September 3, 1952, and at that time plaintiff called the attention of the defendant to its omission to furnish the plaintiff with the necessary drawings in order that the gratings be properly fabricated. This must have been contemplated because when again brought to defendant's attention, the defendant immediately sent the drawings and expressed regret for not having done so, stating that the print enclosed was of the grating required under its order number 11465. There could be no doubt in defendant's mind that plaintiff intended to fabricate the grating called for by the contract in accordance with the drawings and print submitted to it by the defendant, and this is what it did, and this is what defendant expected plaintiff to do or it would not have sent the drawings to the plaintiff. Under these circumstances and the facts disclosed by this record defendant is estopped from now insisting that it should not pay the contract price for the

now immediately that it should not pay the cheapest price for the
and the facts disclosed by this record defendant is estopped from
sent the drawings to the plaintiff. Under these circumstances
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mitted to it or the defendant, and this is what it did, and this
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Mit dieser Frage war demzufolge nicht unvereinbar.

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under no obligation to call plaintiff's attention to the error;
that the work was subject to the approval of the architect; that
the rejected disapproved because the gratings were unusable and

gratings so fabricated in accordance with the details of the print which had been approved by the architect, the contractor, and sent to the plaintiff by the defendant, subcontractor. Defendant states that the gratings were not of the exact length called for by the drawings, but this was not the reason for their rejection. They were rejected because they were not usable, and they were not usable because the carrying bars ran parallel to instead of at right angles to the supporting beams, and the carrying bars ran parallel to the supports instead of in the reverse direction because the drawings prepared by the architect and furnished plaintiff by the defendant so provided. The architect's rejection was based upon an error which he himself made. The parties themselves treated the shop drawings as a part of the contract and having done so defendant cannot now be heard to say that plaintiff should have disregarded these drawings.

In the view we take of this record, it is unnecessary for us to determine whether the court erred in submitting the issues made by the pleadings to the jury. There was no dispute as to the amount of damages. The verdict of the jury was just and proper and is supported by the evidence (Consolidated Coal Co. v. Schaefer, 135 Ill. 210,217). There is no reversible error in this record, and the judgment should be affirmed.

Judgment affirmed.

Crow J. Concurs
Eovaldi J. Concurs

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In the view we take of this record, it is unnecessary for us to determine whether the court erred in submitting the issues made by the pleadings to the jury. There was no dispute as to the amount of damages. The verdict of the jury was just and proper and is supported by the evidence (Consolidated Coal Co. v. Schaefer, 132 Ill. 210,217). There is no reversible error in this record, and the judgment should be affirmed.

Judgment affirmed.

Brown, J. Concurs
Dissents, J. Concurs

O.K. 13 W.E. 343A

Abstract

Gen. No. 10681 Agenda No. 21

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, A. D. 1955

SAMUEL C. LURIE, Plaintiff-Appellant, vs. JULIA DOMBROSKI, Defendant-Appellee	7 I.A. 24 543 Appeal from Circuit Court of McHenry County.

CROW, J.

This is described by the plaintiff-appellant, Samuel C. Lurie, as a creditor's bill brought to subject to the payment of a judgment against the defendant Peter Dombrowski certain real estate, title to which is allegedly in the defendant-appellee Julia Dombrowski under an alleged resulting trust of which the defendant Peter Dombrowski is the beneficiary.

The complaint alleges, in substance, that on July 8, 1932 a predecessor in interest of the plaintiff obtained a judgment against Peter Dombrowski in the Municipal Court of Chicago; an execution thereon was returned unsatisfied; the judgment was assigned to the plaintiff December 11, 1945; the plaintiff brought suit on the judgment in the Circuit Court of McHenry County and there obtained a judgment on March 19, 1954; an execution thereon was returned unsatisfied; Julia Dombrowski was and is the wife of Peter Dombrowski and Marie Dee is their daughter; on and prior to September 30, 1936, one Henry F. Vallely, an attorney, as agent and attorney for Peter Dombrowski had in his possession certain

Abolition

funds of Peter and on that date purchased the real estate concerned with such funds, Vallely taking title in his own name, without the knowledge of Peter, thereby resulting in a trust for Peter; Julia Dombrowski by various mesne conveyances from Vallely thereafter obtained title to the real estate, there being no consideration for such conveyances, all the grantees had knowledge of Peter's rights and interests, and such conveyances were made with intent to hinder, delay, and defraud Peter's creditors; and Julia resides on the real estate.

Both of the defendants Peter Dombrowski and Julia Dombrowski were served, but evidently Peter filed no pleading.

The defendant Julia Dombrowski filed a motion to strike the complaint, asking that the complaint be stricken and the cause be dismissed as to her, for various reasons.

On February 21, 1955 the defendant Julia's motion was allowed and the complaint dismissed as to her.

Subsequently, on March 18, 1955 the plaintiff made a motion, accompanied by an affidavit, to vacate the order of February 21, 1955, to grant a rehearing on the complaint and motion to strike, to grant the plaintiff leave to file a first amendment to the complaint, and to rule the defendant to plead to the complaint as amended, or, if such leave be not granted, to deny the defendant's motion and rule her to answer.

On that same date, March 18, 1955, an order was entered granting the plaintiff's motion to vacate the order of February 21, 1955 and for a rehearing, and further providing, so far as material, "the said motion of the defendant Julia Dombrowski heretofore filed herein to dismiss the original complaint herein as to her be, and the same is hereby allowed. - - - and the complaint heretofore filed in this cause is hereby dismissed as to the defendant Julia Dombrowski".

The present appeal is from the order of March 18, 1955. That order, so far as material, allows the defendant Julia's motion to dismiss the complaint and dismisses the complaint as to her.

The defendant-appellee, Julia Dombrowski, has filed in this court a motion, which was taken with the case, to dismiss the appeal on the grounds the order of March 18, 1955 is not a final, appealable order, for two reasons. It will be necessary to discuss only one of these reasons.

CH. 110 ILL. REV. STATS., (1953) par. 201, provides, in part:

"(1) Appeals shall lie to the Appellate or Supreme Court, in cases where any form of review may be allowed by law, to revise the final judgments, orders, or decrees of the Circuit Court ----" (emphasis added).

An order overruling or sustaining a demurrer (or motion to dismiss) as to a pleading is merely interlocutory, not final, and is not appealable: TREBBIN v. THORRESZ et al. (1925) 316 Ill. 30; BARBER v. WOOD et al. (1925) 318 Ill. 415; WILLIAMS et al. v. HUEY et al. (1914) 263 Ill. 275. A final judgment, order, or decree following the sustaining of a motion to dismiss a complaint should not merely sustain the motion and dismiss the complaint but adjudge, in substance, that the plaintiff take nothing, and the defendant go hence without day, or contain words or phrases of equivalent import and meaning: PRANGE et al. v. CITY OF MARION (1938) 297 Ill. App. 353; BOARD OF EDUCATION etc. v. BOARD OF EDUCATION etc. (1939) 301 Ill. App. 228. The order of March 18, 1955 here, standing alone, does not end the proceeding in the trial court and is not a final, appealable order; it is essential to finality that the case be disposed of, not merely by sustaining the motion to dismiss the complaint and striking and dismissing the complaint, but by an order or judgment that finally disposes of the case: REIDEN

v. TAMBONE (1955) 6 Ill. App. (2) 325.

The plaintiff-appellant refers us, on this point, to MILLS v. EHLER et al. (1951) 407 Ill. 602; DONER v. PHOENIX etc. BANK etc. et al. (1942) 381 Ill. 106; WOODS et al. v. OLD NATIONAL BANK (1944) 322 Ill. App. 1; and WILHITE et al. v. AGHAYANI et al. (1954) 2 Ill. App. (2) 29.

MILLS v. EHLER et al. was an appeal by the plaintiff from a decree dismissing the cause for want of equity; the original complaint had previously been dismissed on motion of the original defendants because of failure to include necessary parties, and it had also previously been dismissed on motion of certain additional defendants who had been added later, by amendment, in Counts 2 and 3, because the original complaint had not made them defendants, - the exact language of the orders of dismissal of the original complaint not being set forth in the opinion; before the filing of Counts 2 and 3 the cause had already been heard some years before by a Master on the original complaint and exceptions to a Report had been sustained by the Court because of lack of necessary parties; the Court said no appeal had been taken from the orders dismissing the original complaint, which orders disposed of the issues thereby raised; on the current appeal the appellees moved to strike from the record all matters relating to the original hearing before the Master on the original complaint, and the Court held that, under the circumstances, the orders dismissing the original complaint were final and appealable, and no appeal having been taken the matters on that original hearing were not a competent part of the record on the current appeal, - the cause of action therein was different and separate from Counts 2 and 3, the proof was entirely different, and those orders disposed of a separate, distinct branch of the case, - that was their substance and effect, regardless of the form thereof. The facts and circumstances there were entirely

v. Ehrlich (1909) 8 112. note (8) 809.

the classificatory extent of, or time period, to
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(1909) 8 112. [illegible] (8) 809.

[illegible] [illegible] [illegible] [illegible]

different from those in the case at bar. Here the order of March 18, 1955 does not, in substance and effect, dispose of the cause. It determines only a particular motion to dismiss and a particular form of complaint.

In DONER v. PHOENIX etc. BANK etc. et al. a motion to strike a second amended complaint had been allowed and the complaint, as amended, stricken; later an order was entered to this effect: "Motion by defendants to dismiss suit. It appearing -- that -- the second amended complaint -- was stricken -- said motion is sustained and the suit is dismissed at the costs of the plaintiff ---"; the court held, pursuant to some of the cases we've referred to above, that though the first order sustaining a motion to strike a complaint, standing alone, is not a final appealable order, the later order dismissing the suit and assessing costs against the plaintiff is final and appealable. That case, if anything, helps more forcibly to point up the present case. Here there was no subsequent motion by the defendant Julis, or the plaintiff, to dismiss the suit, and there was no subsequent order dismissing the suit, following the disposition of the motion to dismiss the complaint.

In WOODS et al. v. OLD NATIONAL BANK etc. the docket indicated the Court had sustained a motion to dismiss the amended complaint, the plaintiff desired to stand thereon, a "judgment" was rendered dismissing the same at plaintiff's costs, and in bar of action, but the docket went on to say that an order was to be submitted to the Judge who had heard the motion, and that a tentative order had not been approved, and would not be until counsel for the defendant had been heard; under those circumstances, the Court held there was no final, appealable order and the appeal was dismissed. The facts and circumstances there also are quite

different from those in the case at bar. Here the order of March 10, 1958 does not, in substance and effect, dismiss of the action. It determines only a particular motion to dismiss and a particular form of complaint.

In Doyle v. Douglas Aircraft Co., et al., a motion to strike a second amended complaint had been allowed and the complaint, as amended, adversely title an order was entered to this effect: "Motion by Defendants to dismiss suit." It appearing -- that -- the second Amended Complaint -- was dismissed -- said motion is granted and the suit is dismissed at the costs of the plaintiff ---"; the court held, pursuant to some of the cases we've referred to above, that though the first order requiring a motion to strike a complaint, standing alone, is not a final appealable order, the later order dismissing the suit and assessing costs against the plaintiff is final and appealable. Then came, if anything, rules more forceably to point up the present case. Here there is no subsequent motion by the defendant Delta, or the plaintiff, to dismiss the suit, and there was no subsequent order dismissing the suit, following the disposition of the motion to dismiss the complaint.

In Doyle et al. v. Old Colony Trust Co., the lower Court dismissed the Doyle had overruled a motion to dismiss the amended complaint, the plaintiff desired to stand thereon, a "judgment" was rendered dismissing the case at plaintiff's costs, but in her bill petition, but the decree went on to say that no order was to be entered in the Judge who had heard the motion, and that a instructive order had not been rendered, and would not be until counsel for the defendant had been heard; under these circumstances, the Court held there was no final, appealable order and the appeal was dismissed. The facts and circumstances there also are quite

different from those here, though, if anything, the outcome and result, - dismissal of the appeal, - is somewhat persuasive here against the plaintiff-appellant.

In WILHITE et al. v. AGBAYANI et al. there was an appeal from an order dismissing a counterplaintiff's cause without prejudice on motion of the counterplaintiff, the order having been entered after the trial had begun and a jury had been selected and sworn, and the written motion of the counterplaintiff being a motion to dismiss his case; the court, among other things, said the order allowing the counterplaintiff's motion to dismiss his cause without prejudice terminated the case and was final and appealable. Again, the facts and circumstances there are not analogous to the present case, but it may also be observed there is no motion here by the plaintiff to dismiss the case or cause, and there is no order so dismissing the case or cause, and although the defendant Julia's motion here asked that the cause be dismissed as to her that phase of the motion has never been passed on and determined.

We do not consider that those cases militate against the views we entertain.

Accordingly, the motion of the defendant-appellee, Julia Dombrowski, to dismiss the appeal must be, and is hereby, allowed, and the appeal is hereby dismissed. Under the circumstances, we have not given consideration to the merits of the case or the matters raised on the attempted appeal.

Appeal dismissed.

Dove, P.J. Concurs

Eovaldi, J. -- Concurs

O.K. B.M.G.

345 A

Abstract

General No. 10867 Agenda No. 11

IN THE

APPELLATE COURT OF ILLINOIS

- - -

SECOND DISTRICT

- - -

October Term, A. D. 1955

P. W. GUSTAFSON, etc., Appellee, vs. LIBERTYVILLE MOTORS, INC., etc., et al, Appellant. --- LIBERTYVILLE MOTORS, INC., etc., Counter-Claimant-Appellant, vs. P. W. GUSTAFSON, et al, Counter-Defendants-Appellees.	APPEAL FROM THE CIRCUIT COURT OF LAKE COUNTY.

DOVE, P. J.

This is an appeal by Libertyville Motors, Inc., an Illinois corporation from a final order of the Circuit Court of Lake County dismissing, for want of equity, upon motion of counter-defendants, P. W. Gustafson, Wayne R. Gratz and Genevieve M. Gratz, its amended and supplemental counterclaim, as amended. For convenience, the amended and supplemental counterclaim, as amended, will be referred to hereafter as the

IN THE

APPELLATE COURT OF ILLINOIS

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FILED

NOV 1 4 1935

JUSTUS I. JOHNSON
Clerk Appellate Court Second Dist.

- - -

October Term, A. D. 1935

71 A. 574

P. H. CORTELYOU, etc.,

Appellee,

vs.

LIBERTYVILLE VOTERS, INC.,
etc., et al,

Appellant.

LIBERTYVILLE VOTERS, INC., etc.,

Counter-Plaintiff-Appellant,

vs.

P. H. CORTELYOU, et al,

Counter-Defendants-Appellees.

APPEAL FROM THE
CIRCUIT COURT OF
LAKE COUNTY.

IRVE, J. 1.

This is an appeal by Libertyville Voters, Inc., an Illinois corporation from a final order of the Circuit Court of Lake County dismissing for want of equity, upon motion of counter-defendants, P. H. Cortelyou, Wayne R. Ursin and Genevieve R. Ursin, the amended and supplemental counterclaim, as amended. For convenience, the amended and supplemental counterclaim, as amended, will be referred to hereafter as the

counterclaim; the Counterclaimant, Libertyville Motors, Inc., will be designated as Libertyville Motors; Counter-defendant, P. W. Gustafson, will be designated as Gustafson, and Counter-defendants, Wayne R. and Genevieve M. Gratz, will be designated as Gratz. The counterclaim has as its object reimbursement for various improvements placed by Libertyville Motors upon certain real estate title to which was vested in the First National Bank of Lake Forest as trustee.

The counterclaim alleged that on April 8, 1939, First National Bank of Lake Forest, as trustee, executed and delivered a trust agreement, a copy of which was attached to and made a part [redacted] of the counterclaim; that at the same time there was conveyed to said trustee under a trust agreement, known as Trust No. 340, certain described real estate located in the Village of Libertyville; that said trust continued in existence until September 15, 1953; that at the time of the delivery of said trust agreement the sole and only beneficiaries of said trust were Wayne R. Gratz and Genevieve M. Gratz, as joint tenants, to a one-half interest therein, and William E. Larson and Elsie D. Larson as joint tenants to the other one-half; that in the year 1947, Libertyville Motors was in possession of the premises covered by the trust as a tenant under a lease from the trustee, which lease provided for a rental of $300.00 per month and expired on January 1, 1950; that Wayne R. Gratz was the agent of all of the beneficiaries of said trust; that in 1947, Libertyville Motors, in order to expand the business which it was then operating on the premises, which was [redacted] the subject matter of the trust, desired to enlarge the improvements thereon; that it then entered into an oral agreement with Wayne R. Gratz, who acted for himself and the other

beneficiaries of the trust, to construct an addition on said premises at an estimated cost of from $7,000.00 to $8,000.00; that Libertyville Motors would pay the cost of said improvement and at the termination of its right of occupancy said addition and improvement would become and remain a part of the real estate described in the trust agreement; that the beneficiaries of the trust would in return give counterclaimant the right to occupy the premises for ten years at a rental of $300.00 per month for the first three years and $200.00 a month for the last seven years of its term; that this period of ten years would be evidenced by two five year leases; that this would be accomplished by the beneficiaries joining in a direction to the trustee to execute said leases; that, thereafter, pursuant to said oral agreement, the beneficiaries directed the trustee to execute a lease to Libertyville Motors for a five-year term, but failed to include in said direction, through error or inadvertence, a provision for a second five-year lease; that, thereafter, Libertyville Motors erected on the premises improvements costing in excess of $7,500.00; that said improvements so erected enhanced the value of said premises at least $7,500.00; that, thereafter, the Larsons (then the owners of an undivided one-half interest in said premises) sold their interest in the trust to one Zubrowski, and on October 23, 1948, Zubrowski sold his undivided one-half interest to Libertyville Motors, the counterclaimant herein; so, that from then until January, 1952, the beneficiaries of said trust were Gratz and Libertyville Motors; that Gratz, on or about January 1, 1949, had knowledge of and were informed of the conveyance of an undivided one-half interest in the trust property to Libertyville Motors.

The counterclaim then alleged that during the middle part of 1949, Libertyville Motors, through its agents and officers, discussed with Wayne R. Gratz, on behalf of himself and his wife, the matter of placing additional improvements on the premises in question; that Gratz was informed at that time that the lease then existing between Libertyville Motors and the trustee had no provision for a renewal thereof as had been agreed upon; that Libertyville Motors wished to place a substantial addition on the premises and would do so at its own cost, provided it was assured of a renewal of its lease from the trustee for the second five-year period expiring January 1, 1958 as had been originally agreed upon; that Gratz and Libertyville Motors entered into an oral agreement by which Libertyville Motors agreed that it would place upon the premises a large addition costing between $15,000.00 and $20,000.00, which addition would become a permanent part of the premises; that Gratz agreed that they would pay their share of the cost of said improvements by joining with Libertyville Motors in a direction to the trustee to lease to Libertyville Motors these premises at a rental of $200.00 a month for the period from January 1, 1953, to January 1, 1958; that Libertyville Motors was then in possession of said premises as a lessee and as a tenant in common with Gratz; that said addition was erected on the premises at a cost in excess of $20,000.00, for which Libertyville Motors paid the entire amount; that Gratz consented to said addition being constructed; that Libertyville Motors operated on said premises an auto sales agency, and during the month of July, 1950, it sold its business (but not any interest which it had in the real estate or land trust) to Gustafson; that during said negotiations for the sale of its

said business, Gustafson was informed that Libertyville Motors owned one-half of the beneficial interest in the trust and that Gratz owned the other one-half, and that Libertyville Motors was entitled to occupy the premises until January 1, 1958, by virtue of the oral agreement hereinbefore referred to with Gratz; that on or about July 18, 1950, Libertyville Motors sold its business to Gustafson with the understanding that the business would be carried on by Libertyville Motors and Gustafson until a corporation was formed by Gustafson and until Libertyville Motors was assured that Gustafson would receive a Plymouth and DeSoto dealer's franchise; that this sale was eventually completed and a sublease was entered into by the provisions of which Libertyville Motors subleased the premises to Gustafson Motors, Inc. This corporation was thereafter dissolved and the lease assigned to P. W. Gustafson and Marie Gustafson. This leasewas for a period of five years at a rental of $550.00 a month for the first four months and $500.00 a month for the remainder of the term. It is then alleged that Gustafson went into possession of the premises and during the negotiations with Gustafson, Libertyville Motors informed Gratz of the sublease and its terms, and Gratz orally consented to the same. A copy of this sublease was also attached to and made a part of the complaint.

It is then alleged in the counterclaim that in the latter part of 1951, Libertyville Motors requested that Gratz enter into a direction to the trustee to extend the lease in accordance with the oral agreement between Libertyville Motors and Gratz, but that Gratz refused to so join in said direction; that, thereafter, Gustafson, on January 24, 1952, purchased the Gratz interest in said trust so that Gustafson and

Libertyville Motors became the owners of the beneficial interest in said trust; that for the Gratz interest therein Gustafson paid Gratz $30,000.00; that Gustafson continued to pay rent to Libertyville Motors under the terms of his sublease down through the month of December, 1952, and refused to pay any further rent from that date because he contended that the sublease between him and Libertyville Motors expired on December 31, 1952; that Gustafson refused to pay Libertyville Motors anything toward the improvements which it had placed on the premises pursuant to the oral agreements between Libertyville Motors and Gratz, although Gustafson had purchased the interest of Gratz with full knowledge that Libertyville Motors had placed the improvements on the premises pursuant to the oral agreements and that Gustafson refused to join with Libertyville Motors in a direction to the trustee for an extension of the lease between Libertyville Motors and the trustee pursuant to its oral agreement with Gratz. The pleader then concludes that to allow Gratz to sell to Gustafson his one-half interest in the trust without his contributing anything toward the improvements placed on said premises by Libertyville Motors pursuant to its oral agreement with Gratz would constitute an unjust enrichment of Gratz and insists that Libertyville Motors should be compensated by Gustafson for one-half of the costs of the improvements placed on the trust property.

The counterclaim prayed for an order decreeing that Libertyville Motors is entitled to contribution from the counter-defendants for the improvements made by it on the trust property and for an accounting and judgment for such an amount as may be found to be due it.

be issued to be due it.

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Attached to the counterclaim and made a part thereof was the lease between Libertyville Motors and the trustee. Its term was for five years, commencing on January 1, 1948, and ending on December 31, 1952. It provided that the premises were to be occupied as a sales agency for new and used automobiles; gasoline and service station; garage and repair service and kindred business and for no other purpose whatever. It specified the rentals were to be $300.00 a month for the first three years and $200.00 a month for the last two years. The second clause of the lease set forth that said premises should not be sublet without the written consent of the lessor, and the twenty-first clause provided: "This lease supersedes and voids, cancels and nullifies any and all leases, agreements and understandings, either verbal or in writing, heretofore entered into, between the lessor and any and all lessees of lessor, or assigns of lessees, appertaining to the within described premises heretofore in possession of said premises; - - ." The twenty-fourth clause of the lease gave the lessee the right to erect an addition to the premises and to make alterations therein according to his own plans and at his own cost, and further provided any improvements or alterations so made would become an integral part of the building and remain permanently affixed thereto.

Also attached to the counterclaim and made a part thereof was a sublease between Libertyville Motors, Inc., and Gustafson Motors, Inc. (later assigned by Gustafson Motors, Inc., to Gustafson). It was to run from September 1, 1950, to June 30, 1955, and called for a rental of $500.00 per month for the first four months and $550.00 per month for the balance of the term of the lease.

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time by, them, and ending for a total of $5000.00 per month for
Inc.', to hereafter). It was to run from September 1, 1990, to
Inc., and Universal Company, Inc. (later referred by hereafter as',

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[illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

Gratz and Gustafson filed separate motions to dismiss the counterclaim. The principal grounds of both of these motions were that the oral agreements of 1947 and 1949 deal with the leasing of land or some interest therein for a longer period of time than one year, and were therefore unenforceable under the Statute of Frauds; that there is no agreement implied in law for contribution between or among the parties for any improvements placed on the premises, and that any performance of said oral agreements by Libertyville Motors was not sufficient to remove the bar of the Statute of Frauds because Libertyville Motors did not take possession of said premises pursuant to the oral agreements but was already in possession of same as a lessee.

It is the theory of Libertyville Motors that the oral agreements of 1947 and 1949 are not within the Statute of Frauds, but that if they are, Libertyville Motors may still recover upon the theory of an implied contract. It is further contended that even without an agreement, either oral or written, the law will require contribution in this case because of the relationship of the parties, and that equitable principles which are applicable in partition proceedings should be applied in this case for the reason that the parties involved here occupy the position of tenants in common to each other or a position equivalent thereto. It is the theory of Gratz and Gustafson that the oral agreements are clearly barred by the Statute of Frauds, and there are no facts alleged in the counterclaim which would justify recovery on the grounds of an implied contract.

Section 2 of the Statute of Frauds (Ch. 59, par. 2, Ill. Rev. Stat. 1963) provides: "No action shall be brought to charge any person upon any contract for the sale of lands,

tenements or hereditaments, or any interest in or concerning them, for a longer term than one year, unless such contract or Some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized in writing, signed by such party." The counterclaim here alleges that the agreements for a five-year extension of the lease to Libertyville Motors and for contribution on account of the improvements sought to be enforced by Libertyville Motors in connection with the land involved were oral agreements. It seems clear to us that such agreements involved an interest in land and are, therefore, directly covered by the foregoing section of the Statute of Frauds. Libertyville Motors seeks to avoid the effect of this statute by the allegations in its counterclaim that it performed the oral agreements in question, and that such performance, therefore, removed the case from the bar of the statute. The authorities are well settled that to avoid the effect of the statute, partial performance of the oral agreement relied upon must have been made while the claimant was in possession of the real estate pursuant to said oral agreement and in part performance of the same. (Ranson v. Ranson, 233 Ill. 369; McCallister v. McCallister, 342 Ill. 231; Shenk v. Continental Ill. Nat. Bank & Tr. Co., 334 Ill. App. 373; Christensen v. Christensen, 265 Ill. 170; Wright v. Raftree, 181 Ill. 464.) The pleadings here clearly disclose that Libertyville Motors was in possession of the premises pursuant to its lease with the trustee for these premises, and not by virtue of any oral agreement to erect improvements thereon. Nor is there anything in the pleadings to indicate that Libertyville Motors ever continued in possession of said premises after December 31, 1952, under the oral

agreement of 1949. There being no allegation in the counterclaim that Libertyville Motors ever took possession of the premises under the terms of the oral agreement for the renewal of the written lease, the Statute of Frauds clearly bars the enforcement of this agreement.

It is next insisted by counsel for counterclaimant that if the oral agreements are unenforceable because of the Statute of Frauds, counterclaimant is still entitled to recover for the improvements placed upon the premises, pursuant to the oral agreements, because of a promise which the law implies on account of the making of these improvements. As to the oral agreement of 1947, the written lease for the term January 1, 1948, to December 31, 1952, clearly supersedes any prior agreement or understanding between the parties. The twenty-first clause of this lease expressly so provided, and the twenty-fourth clause of the lease provided that the lessee could build additions to the premises and make alterations therein, but he must do so at his own cost, and that these additions and alterations would become a part of the premises. Under these provisions, the law certainly implies no contract for anyone to contribute to the expense involved in making the additions or alterations. Any right of contribution which the law might imply is expressly negatived by the terms of the lease.

As to the right of counterclaimant to recover for the improvements which it made under the oral agreement of 1949, there must be an allegation of a substantial change in the position of the counterclaimant to its detriment before it would be entitled to recover. (Edwards v. Brown, 308 Ill. 350; Snyder v. French, 272 Ill. 43; Winans v. Bloomer, 321 Ill. 76.) The facts alleged are that the premises were sold pursuant to a

stipulation of counterclaimant and Gustafson and the sale completed and the trust terminated on or about September 15, 1953; that counterclaimant received pursuant to said stipulation one-half of the appraised value of said premises. Counterclaimant, therefore, received one-half of the value of the improvements which it placed on said premises under the oral agreement of 1949. Furthermore, it appears that after Libertyville Motors sublet the property to Gustafson at a rental of $550.00 per month for the first four months and $500.00 per month for the balance of the term of the lease, which ran for almost five years, it kept the difference between the rent which it received under this sublease and the amount that it paid to the trustee. Libertyville Motors collected rent amounting to $15,200.00 from Gustafson. During the same period of time, it paid only $5,400.00 to the trustee. This difference of $9,800.00 it retained. In addition to this, prior to September 1, 1950, it was paying a rental of only $300.00 a month. Moreover, it appears that the improvements which were made on the premises were made primarily for the benefit of Libertyville Motors in the operation of its automobile sales agency. We fail to see where it has suffered any substantial change in its position to its detriment. No facts are alleged in the counterclaim to show such a substantial change as the law requires. Furthermore, when Libertyville Motors made the improvements on the premises during the latter part of 1949 and the early part of 1950 under the oral agreement of 1949, it was a tenant to at least an undivided one-half of the property, and a tenant has no right to receive payment from a landlord for improvements made on the premises in the

absence of an express contract providing for payment. (Diedrich v. Rose, 228 Ill. 610.)

The counterclaim does not state a cause of action and the trial court did not err in sustaining the motions of Counter-defendants, Gratz and Gustafson, to dismiss it. The order appealed from was correct and is affirmed.

Decree affirmed.

Covaldi, J., Concurs

Crow, J., Concurs

DATE	NAME		
9-14	[illegible] Wright	443	5000
9-30	[illegible]	643	5200
[illegible]	[illegible]	[illegible]	[illegible]
[illegible]	[illegible]	956	6628
11/15/74	J Rancken	630	4400
[illegible]	[illegible]	Chapter Cutler	
3/3/76	[illegible]	263	3700
8/19/76	[illegible]	752	9560
	[illegible]	463	3700
	Karabotsos	222	9350